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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 190—Appeal Docketed June 22nd

COOLEY ELLIS,
Appellant,
vs.
OHIO TURNPIKE COMMISSION,
Appellee

and

STATE OF OHIO, ex rel. COOLEY ELLIS,
Appellant,
vs.
HON. JOY SETH HURD, ET AL.,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

JURISDICTIONAL STATEMENT

Appellant appeals judgments of the Supreme Court of the State of Ohio entered on December 28, 1955 and seeks with this statement to show the Supreme Court of the United States that substantial questions are involved. The above cases arise from a single transaction involving the power of eminent domain assigned to the Ohio Turnpike Commission and pertaining to lands owned by appellant Cooley Ellis.

Final judgment was entered by the Supreme Court in the two appropriation cases on December 28, 1955. A motion for a rehearing was promptly filed and on the 25th day of January, 1956 the rehearing was denied.

Final judgment was entered in the procedendo case on December 28, 1955, and the motion for rehearing was filed within the 14 days allowed and said motion was denied on January 25, 1956.

Notice of appeal was filed in the two appropriation cases in the Common Pleas Court of Lucas County, Ohio, on the 23rd day of April, 1956. The notice of Appeal was filed in the procedendo case in The Supreme Court of Ohio on the 24th day of April, 1956.

These cases are consolidated in this statement in accordance with Supreme Court Rule 15 (3). The first two cases listed above are appropriation or condemnation cases by virtue of the Ohio Turnpike Act, being 5537.01-.99 of the Revised Code of the State of Ohio, and in manner of procedure the sections relating to general condemnation procedure for the State of Ohio, to wit: Sections 5537.1-.23 Revised Code of Ohio. The third case listed above is a suit in equity to declare rights of the appellant prior to final decision in the appropriation cases.

The jurisdiction of the Supreme Court to review the decisions by direct appeal is conferred by Title 28 U. S. Code, Sec. 1257.

OPINION BELOW

The opinion of the Supreme Court of the State of Ohio in the appropriation cases is reported in Volume 164, p. 377 O. S. The opinion of the Supreme Court of the State of Ohio in the equity case is reported in Volume 162, O. S. 86 and 120 N. E. 2nd 719. The opinions of the court and their rulings will appear in the appendix which is sub-divided

into 6 parts. The Ohio Turnpike Act is included as Appendix A. Appendix B includes the opinions and other requirements of the court as to the first appropriation proceedings. Appendix C contains the opinion and other requirements of the court as to the second appropriation proceedings. Appendix D contains the opinion and requirements of court with reference to the procedendo proceeding subsequent to the decree of the Supreme Court in the equity suit. And Appendix E the Resolutions for the appropriation. Appendix F contains the Application for a rehearing in the appropriation cases.

JURISDICTION

The appropriation procedures were brought under the Ohio Turnpike Act and were based on resolutions of necessity executed by the Ohio Turnpike Commission. The procedures required merely a statement by the appellee as to such necessity and the sole issue remaining a decision as to market value of the lands and easements appropriated in such a resolution. The appellant in this petition, was named a defendant in the appropriation cases, though no suit at law was possible because no pleading nor answer was allowed concerning the appropriations in any respect except appraisal of the market value of the property.

In the equity case, the appellant sought to restrain by injunction the above-mentioned appropriation cases on the grounds that the Ohio Turnpike Commission failed to show the necessity for taking and failure to negotiate in violation of the provisions of The Ohio Turnpike Act and the unconstitutionality of certain portions of this Act. This petition was demurred to in Common Pleas Court and sustained on appeal to the Court of Appeals, and then was appealed to the Supreme Court of the State of Ohio.

Concurrently, there was being sought by the Ohio Turnpike Commission, a determination of the market value of

the lands and easements being appropriated, and by the appellant, a definition of his rights to such land under the Ohio Turnpike Act and the pertinent laws of eminent domain within the State of Ohio.

In the appropriation suits two separate cases were tried before juries and two separate awards made. Both decisions were appealed to the Sixth District Court of Appeals of the State of Ohio on the basis of inadequacy of awards and assignment of numerous errors. The Court of Appeals reversed the decisions of the lower courts in both cases and remanded for retrial. However, the Ohio Turnpike Commission, appellees herein, appealed to the Ohio Supreme Court in the form of a request to certify the record. Fully argued in this Court was its jurisdiction on the ground that the reversal by the Court of Appeals was based on a whole record and under the Ohio Turnpike Act itself, and under the Constitution of the State of Ohio, the remand for retrial in the lower courts constituted a conclusion to the controversy. The decision by the Court of Appeals, founded on the errors cited, amounted to an interlocutory decree for new trial and all prior decisions by the Ohio Supreme Court have been consistent in declaring there can be no appeal from an interlocutory decree.

Therefore, the appellant has been denied his constitutional right for correction of errors assigned and benefit of the decision of the Court of Appeals in relation to the appropriation suits. The Ohio Supreme Court has reversed its precedents that there could be no appeal from an interlocutory judgment and made a decision entirely unexpected. On motion for re-hearing, the appellant advised the Supreme Court of the State of Ohio fully concerning his claims under the 14th Amendment of the Constitution of the United States; that his property was being

taken without due process of law and without just compensation.

A similar situation under almost identical procedure in the State of Illinois is contained in the case of *Chicago B. & Q. R. v. Chicago*, 186 U. S. Rep. 226. In this decision it was held that the usual rules prohibiting raising of constitutional questions if not cited before a rehearing do not obtain where the defendant had no opportunity to raise these questions. The decision further declared that where a reversal of precedent by a state court has caught a party by surprise he is not precluded from raising such constitutional questions in rehearing.

A similar denial of due process rests in the course of the equity suit in which the constitutionality of the Ohio Turnpike Act was questioned and injunction sought to restrain trial of the appropriation cases until appellant's claim that the Resolutions of Necessity under which his lands were seized were faulty had been heard. This petition was demurred to in the lower courts and the general demurrer was sustained until the decision of the Ohio Supreme Court on June 30, 1954 split the demurrer, reversed the Court of Appeals in regard to one section of the Resolutions of Necessity, relating to sign rights. Appellant's case was combined with another case, as will appear in Appendix D. The balance of the questions raised and the demurrer thereto were remanded to the Court of Appeals for trial. No amendments were permitted and thus appellant has been denied trial of any kind on his claims that the acts of the Ohio Turnpike Commission were arbitrary, capricious and an abuse of discretion.

Further appeal to the Ohio Supreme Court to clarify its decision in the equity suit and to permit amendment and to hear on the merits the Appellant's claim that he was being deprived of his lands without due process and just compensation were denied without comment. Pro-

ceedings in procedendo to compel the Court of Appeals to carry out the mandate of the Ohio Supreme Court was denied on the ground that the procedure was irregular.

Thus, to summarize the position of the appellant: in all three cases the Appellant has been confined solely to statutory proceeding though at the first opportunity in each of the cases he has raised constitutional questions which have been ignored completely. The constitutional rights claimed to have been violated are of fundamental importance not only in the State of Ohio but also in several other states where turnpikes or toll roads are constructed or are under construction under authorization of state legislatures which allow the executive authority varying degrees of discretion in exercising powers of eminent domain. In the Appellant's case such powers have been abused but without due process his claims cannot be heard.

Proceedings for ascertainment of value are merely inquisitional to establish market value, *U. S. v. Jones*, 109 U. S. 513, 3 S. Ct. 346, 27 L. ed. 1015.

In the case of *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U. S. 226 a very similar question was before the court. The Illinois statute on condemnation followed the same form of procedure as in the State of Ohio. In that case the appellant appealed from an adverse judgment as to value and no constitutional questions were raised except on motion for new trial and this court held that due to the nature of the case in the respect that the land owner was not permitted to file an answer and had no means of raising the constitutional questions until the final decision of the Supreme Court of Illinois; that he was not precluded from an appeal to this court.

Furthermore where the question of constitutionality is not raised except upon motion for re-hearing, Appellant could show that he was caught by surprise by reason of

an unanticipated decision by the State Supreme Court. Then he may be excused from not having raised the question at an earlier date. *Saunders v. Shaw*, 244 U. S. 317, 34 S. Ct. 638, 61 L. ed. 1163. *Herndon v. Georgia*, 295 U. S. 441. *Ohio v. Akron Park District*, 281 U. S. 75.

In the case of *Green v. Acacia Mutual Life Insurance Company*, 156 Ohio State Reports, page 1, the court said:

> "Thus, under the constitutional amendment of 1912, the courts of Appeals had the jurisdiction to review judgments, including all decrees and final orders, and the General Assembly had no power to enlarge or limit the jurisdiction of the court.
>
> In a long line of cases beginning with *Concord v. Runnels*, 23 Ohio St. 601, and running through *Hoffman v. Knollman*, 135 Ohio St. 170, 20 N. E. (2d) 221, *this court held that the setting aside of a general verdict of a jury and granting of a motion for a new trial does not constitute a final order and cannot be reviewed by an appellate court unless there is an abuse of discretion by the trial court in granting such motion.*"

QUESTIONS PRESENTED

(1) Whether the provisions of the Ohio Turnpike Act (General Code Section 1208, Revised Code of Ohio 5537.01-5537.99) delegating to the executive branch of government and the Ohio Turnpike Commission, a corporate body administrative in nature, the full powers of eminent domain, is in violation of Article IV, Section 4 of the Constitution of the United States that guarantees a republican form of government.

(2) Whether this proceeding in appropriating fee title and any and all abuttor rights, including access rights,

appurtenant to any remaining portion of the land of said owner or owners, of which the appropriated property shall have formed a part prior hereto, in, over, or to the parcels taken, including such rights to any turnpike constructed thereon, constitute the taking of an excessive amount or interest in land in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(3) Whether the authority granted to the Turnpike Commission under the Ohio Turnpike Act (General Code Section 1208, Revised Code 5537.01-5537.99) in taking private property for purposes of motels, stores, restaurants and similar private enterprises and businesses, constitutes the taking of land in violation of the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States.

(4) Whether the delegation of authority under the Ohio Turnpike Act (General Code Section 1208, Revised Code 5537.01-5537.99) to the Ohio Turnpike Commission, a body corporate and politic to exercise the power of eminent domain for construction of a private toll road, the profits, if any, to go first to private bondholders, is a taking of private property for private use in violation of the 14th Amendment to the Constitution of the United States.

(5) Whether the provisions for awarding of damages and denial of a hearing on the question of necessity provided for in the Ohio Turnpike Act (General Code Section 1208, Revised Code 5537.01-5537.99) and its application to the owners of property are repugnant to the Constitution of the United States, in that each results in a deprivation of property without due process and denies each owner equal protection of the laws, all of which is prohibited and invalid under Section 1 of the Fourteenth Amendment to the United States Constitution.

(6) Were the resolutions adopted by the Ohio Turnpike Commission for the appropriation of the Appellant's property sufficiently definite and certain in both description and purpose for the statutory precedure to evaluate his land?

(7) When the Turnpike Commission instituted said proceedings naming a large number of defendants who had no interest whatever in said land and which the proofs showed conclusively and without any dispute were solely owned by Appellant; is said award to all said defendants to be considered as fair and just compensation to Appellant when he is unable to collect the same without costly litigation and delay and in violation of the said 14th Amendment?

(8) Did not the Supreme Court of Ohio by reversing the Court of Appeals and acting without jurisdiction deprive Appellant of due process of law and deprive him of fair compensation in violation of the said 14th Amendment?

(9) Is not the Ohio Turnpike Act unconstitutional as in violation of the 14th amendment and Art. 4, Sec. 4 of the Constitution and the statutes of the United States governing Interstate Commerce and the National Securities Act?

STATUTES INVOLVED

The statutes involved are the Ohio Turnpike Act and the general condemnation act being Section 5537.01, Section 5537.99 of the Revised Code of the State of Ohio, respectively.

STATEMENT

The appellant is the owner of two parcels of land comprising approximately 96 acres located at the intersection of Anthony Wayne Trail and Detroit Avenue on the boundary between the cities of Toledo and Maumee, Ohio. The Ohio Turnpike Commission desired to acquire a right of way for the Ohio Turnpike road through Appellant's said property. The turnpike is a depressed highway over its greater length on Appellant's property, having a width of approximately 320 feet. For the purpose of securing this right of way the Turnpike Commission prepared resolutions which appear in the appendix describing the land and declaring that the same was necessary for public use. As will be observed, upon examination of the description of the land; it could not be ascertained on what part thereof said turnpike would run. The only description is based upon engineering data solely in the hands of the turnpike engineers and is guided by the compass as a ship navigating at sea. The course of the turnpike as finally laid out traverses Appellant's land on a diagonal and in such manner as to utterly destroy 69 acres of Appellant's 96 acres, and destroying his shopping center.

Based on said resolutions the Turnpike Commission immediately instituted suit in the Common Pleas Court of Lucas County, Ohio on October 30, 1953. Two separate trials were had by jury and separate awards made. In instituting the suit the Turnpike Commission named a large number of defendants who as a matter of fact had absolutely no interest in said property and were wholly unnecessary as Appellant had undisputed marketable title as shown in the trial of the case. None appeared to contest the matter excepting Appellant and the mortgagee to pro-

ect its interest under its mortgage. Notwithstanding the proofs clearly showed that these other defendants had no nterest and had entered no contest, the final awards were ntered in favor of all the defendants named and without n any manner determining or specifying their interest. As a result of the faulty description, the award to unnecesary parties and the easements taken the marketable title o the remaining lands of Appellant has been destroyed.

Appellant then appealed in both said condemnation cases to the Court of Appeals of the 6th district for the sary parties and the easements taken, the marketable title State of Ohio, which court after full consideration reversed the awards in both cases for the reasons stated in the opinions which appear in the appendix. As previously stated the Turnpike Commission applied to the Supreme Court of the State of Ohio by obtaining leave so to do, on their petition to certify the records and on the 25th day of January, 1956 the Supreme Court of Ohio rendered its final decision reversing the Court of Appeals which is reported in *Ohio Turnpike Commission v. Cooley Ellis,* 164 volume, page 377, Ohio State Reports. Thereafter motions for rehearing were filed, and denied by said Supreme Court.

THE QUESTIONS ARE SUBSTANTIAL

The issues in this appeal come under two subdivisions. The first is the question as to whether the Appellant was given due process of law and adequate compensation for his property and the damage inflicted upon him. The second phase is the question as to the constitutionality of the Ohio Turnpike Act.

Taking up first the question of due process and just compensation we urge the same points as previously stated and, in addition the naming of unnecessary defendants and the reversal of the previous awards by the Supreme Court of the State when it lacked jurisdiction so to do. On this point we cite the case of *Convers v. Atchison T. & S. F. R. Co.*, 142 U. S. 671, 12 S. Ct. 351, 35 L. ed. 1153.

We also wish to cite on the question of due process of law under similar conditions the case of *Missouri Pacific R. R. Co. v. Nebraska ex rel. Board of Transportation*, 164 U. S. 403, S. Ct. 130, 41 L. ed. 489.

On the question of the faulty resolutions of appropriation we wish to cite the case of *Cincinnati v. Vester*, 281 U. S. 439, 50 St. Ct. 360, 74 L. ed. 450. The above cited case is also authority on the question of excessive condemnation. It will appear from the record and exhibits filed in this cause that an excess of land and easements was taken from appellant which was not made for the right of way and which was considerably wider (320 feet) than the width of the road in the greater part of its course and that said land and easements were taken for other than public purposes.

On the question of the constitutionality of the Ohio Turnpike Act we maintained that the act violates the

14th amendment and Art. 4, Sec. 4 of the Constitution of the United States guaranteeing due process and fair compensation and the republican form of government, respectively.

We maintain that the legislature of the state, in which the power of eminent domain is inherent, may not delegate this power to any other branch of the government without restriction. Under the Turnpike Act the legislature delegated to the Turnpike Commission and the governor of the state unrestricted power to construct turnpikes anywhere within the state and to use the power of eminent domain for the purposes of acquiring the right of way.

We maintain that this act violates the Federal Constitution on its guarantee of a republican form of government as well as the due process clause of the Constitution.

We believe further that the act is unconstitutional for the reason that said power is given to condemn land for other than public purposes in that it provides for the taking for stores, restaurants, gasoline stations, hotels and other private lines of business which are to be rented out on a profit basis. Our contention in this restriction is brought out by the case of *Missouri Pacific R. R. Company v. Nebraska, etc.* which we have cited above. We believe also that the act is unconstitutional for the reason that it takes the fee title in the name of the state of Ohio which pays nothing whatever and then proceeds to sell bonds nationwide on the basis of the fact that said bonds are payable from income only and the bond itself while executed by the Turnpike Commission appears on its face to pledge the faith and credit of the State of Ohio which we further believe is a violation of the constitutional provision which prohibits the issuance by the states of letters of credit; and the act is further objectionable in that said bond issue is sold to the public nationwide without approval by the

Federal Securities Commission. Also said turnpike road is a public utility engaged in Interstate Commerce, its main purpose being to relieve the congested highways of the State of Ohio by affording through traffic on the turnpike and the fixing of rates, tolls and other duties by the commission is an interference with Interstate Commerce and the power of the Federal Government.

In view of the fact that turnpikes have recently increased in many other states of the union it would be appropriate for this court to render a decision under this type of procedure for the reason that endless litigation now exists and applies in every state where such a project is contemplated.

We respectfully submit that all of the questions which we have raised possess merit and circumstances of great importance to the public welfare.

Respectfully submitted,

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APPENDIX A

OHIO REVISED CODE

CHAPTER 5537: TURNPIKE COMMISSION

§5537.01 Definitions. (GC §1204)

As used in sections 5537.01 to 5537.23, inclusive, of the Revised Code:

(A) "Commission" means the Ohio turnpike commission created by section 5537.02 of the Revised Code unless the context indicates a different meaning or intent, or, if such commission is abolished, the board, body, or commission succeeding to the principal functions thereof, or to whom the powers given by such sections to the commission shall be given by law.

(B) "Project" or "turnpike project" means any express highway, super highway or motor way constructed under sections 5537.01 to 5537.23, inclusive, of the Revised Code, at such location as is approved by the governor, including all bridges, tunnels, overpasses, underpasses, interchanges, entrance plazas, approaches, tollhouses, service stations, and administration, storage, and other buildings and facilities which the commission deems necessary for the operation of the project, together with all property, rights, easements, and interests which may be acquired by the commission for the construction or the operation of the project. Each project or turnpike project shall be separately designated, by name or number, and may be constructed or extended in such sections as the commission may from time to time determine.

(C) "Costs," as applied to a turnpike project, embraces the cost of construction, including bridges over or under existing highways and railroads, the cost of acquisition of all land, rights of way, property, rights, easements, and interests acquired by the commission for such

construction, the cost of demolishing or removing any buildings, or structures on land so acquired, including the cost of acquiring any lands to which such buildings or structures may be moved, the cost of diverting highways, interchange of highways, access roads to private property, including the cost of land or easements therefor, the cost of all machinery and equipment, financing charges, interest prior to and during construction and for one year after completion of construction, cost of traffic estimates, engineering and legal expenses, plans, specifications, surveys, estimates of cost and revenues, other expenses necessary or incident to determining the feasibility or practicability of constructing any such project, administrative expense, and such other expense as may be necessary or incident to the construction of the project, the financing of such construction and the placing of the project in operation. Any obligation or expense incurred after September 1, 1949, by the department of highways with the approval of the commission, for surveys, borings, preparation of plans and specifications, and other engineering services in connection with the construction of a project shall be regarded as a part of the cost of such project and shall be reimbursed to the state out of the proceeds of turnpike revenue bonds as authorized by sections 5537.04 to 5537.23, inclusive, of the Revised Code.

(D) "Owner" includes all individuals, copartnerships, associations, or corporations having any title or interest in any property, rights, easements, and interests authorized to be acquired by sections 5537.01 to 5537.23, inclusive, of the Revised Code.

(E) "Revenues" means all tolls, rentals, gifts, grants, moneys, and all other funds and property coming into the possession or under the control of the commission by virtue of sections 5537.01 to 5537.23, inclusive, of the Revised Code, except the proceeds from the sale of bonds issued under such sections.

(F) "Public Roads" includes all public highways, roads, and streets in the state, whether maintained by the state, county, city, township, or other political subdivision.

(G) "Public utility facilities," as used in sections 5537.01 to 5537.23, inclusive, of the Revised Code means: "tracks, pipes, mains, conduits, cables, wires, towers, poles, and other equipment and appliances of any public utility."

§5537.02 "Ohio turnpike commission." (GC §1203)

There is hereby created a commission to be known as the "Ohio turnpike commission." Such commission is a body both corporate and politic in this state, and the exercise by it of the powers conferred by sections 5537.01 to 5537.23, inclusive, of the Revised Code, in the construction, operation, and maintenance of turnpike projects shall be held to be essential governmental functions of the state, but the commission shall not be immune from liability by reason thereof.

The commission shall consist of four members, appointed by the governor, with the advice and consent of the senate, no more than two of whom shall be members of the same political party, and the director of highways who shall be a member ex officio without compensation. The appointive members shall be residents of the state, and shall have been qualified electors therein for a period of at least five years next preceding their appointment. The members of the commission first appointed shall continue in office for terms expiring on July 1, 1951, July 1, 1953, July 1, 1955, and July 1, 1957, respectively, the term of each such member to be designated by the governor. The successor of each such member shall be appointed for a term of eight years, except that any person appointed to fill a vacancy shall be appointed to serve only for the unexpired term. A member of the commission shall be eligible for reappointment. Each appointed member of the commission, before entering upon his duties, shall take an oath as provided by Section 7 of Article XV, Ohio Constitution. The governor may at any time remove any member of the commission for misfeasance, nonfeasance, or malfeasance in office.

The commission shall elect one of its appointed members as chairman and another as vice-chairman, and shall appoint a secretary-treasurer who need not be a member of the commission. Three members of the commission shall constitute a quorum, and the affirmative vote of three members shall be necessary for any action taken by the commission. No vacancy in the membership of the commission shall impair the rights of a quorum to exercise all the rights and perform all the duties of the commission.

Before the issuance of any turnpike revenue bonds under sections 5537.01 to 5537.23, inclusive, of the Revised Code, each appointed member of the commission shall give a surety bond to the state in the penal sum of twenty-five thousand dollars and the secretary-treasurer shall give such a bond in the penal sum of fifty thousand dollars, each such surety bond to be conditioned upon the faithful performance of the duties of the office, to be executed by a surety company authorized to transact business in this state, and to be approved by the governor and filed in the office of the secretary of state. Each appointed member of the commission shall receive an annual salary of five thousand dollars, payable in monthly installments. Each member shall be reimbursed for his actual expenses necessarily incurred in the performance of his duties. All expenses incurred in carrying out such sections, shall be payable solely from funds provided under sections 5537.01 to 5537.23, inclusive, of the Revised Code, and no liability or obligation shall be incurred by the commission beyond the extent to which moneys have been provided under such sections.

§5537.03 Turnpike projects. (GC §1201)

In order to remove the present handicaps and hazards on the congested highways in this state, to facilitate vehicular traffic throughout the state, to promote the agricultural and industrial development of the state, and to provide for the general welfare by the construction of modern express highways embodying safety devices including center divisions, ample shoulder widths, longsight

distances, multiple lanes in each direction, and grade separations at intersections with other highways and railroads, the commission is hereby authorized and empowered to construct, maintain, repair, and operate turnpike projects at such locations as are approved by the governor, and in accordance with such alignment and design standards as are approved by the director of highways, and issue turnpike revenue bonds of this state, payable solely from revenues, to pay the cost of such projects.

§5537.04 Authority and powers of turnpike commission. (GC §1205)

The commission is hereby authorized and empowered to:

(A) Adopt bylaws for the regulation of its affairs and the conduct of its business;

(B) Adopt an official seal, which shall not be the seal of Ohio;

(C) Maintain a principal office and suboffices at such places within the state as it designates;

(D) Sue and be sued in its own name, plead and be impleaded, provided any actions against the commission shall be brought in the court of common pleas of the county in which the principal office of the commission is located, or in the court of common pleas of the county in which the cause of action arose, and provided such county is located within this state, and all summonses, exceptions, and notices of every kind shall be served on the commission by leaving a copy thereof at the principal office with the person in charge thereof or with the secretary-treasurer of the commission;

(E) Construct, maintain, repair, police, and operate turnpike projects, and establish rules and regulations for the use of any such turnpike project;

(F) Issue turnpike revenue bonds of the state, payable solely from revenues, as provided in sections 5537.08 and 5537.09 of the Revised Code, for the purpose of paying

any part of the cost of any one or more turnpike projects;

(G) Fix and revise from time to time and charge and collect tolls for transit over each turnpike project constructed by it;

(H) Acquire, hold, and dispose of real and personal property in the exercise of its powers and the performance of its duties under sections 5537.01 to 5537.23, inclusive, of the Revised Code;

(I) Acquire, in the name of the state, by purchase or otherwise, on such terms and in such manner as it deems proper, or by the exercise of the right of condemnation in the manner provided by section 5537.06 of the Revised Code, such public or private lands, including public parks, playgrounds, or reservations, or parts thereof or rights therein, rights of way, property, rights, easements, and interests as it deems necessary for carrying out sections 5537.01 to 5537.23, inclusive, of the Revised Code, and full compensation shall be paid for public lands, playgrounds, parks, parkways, or reservations so taken;

(J) Designate the locations, and establish, limit, and control such points of ingress to and egress from each turnpike project as are necessary or desirable in the judgment of the commission and of the director of highways to insure the proper operation and maintenance of such projects, and prohibit entrance to such project from any point not so designated, and, at its cost, at all points of ingress and egress, cause to be erected large and suitable signs, facing traffic from each direction on the toll road, which shall designate the number and other designations of all United States or state highways of ingress or egress, the names of all Ohio municipal corporations with a population of five thousand or more within a distance of seventy-five miles on such roads of ingress or egress, and the distance in miles to such designated municipal corporations;

(K) Make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under sections 5537.01 to 5537.23, inclusive, of the Revised Code;

(1) When the cost under any such contract or agreement, other than compensation for personal services, involves an expenditure of more than one thousand dollars, the commission shall make a written contract with the lowest and best bidder after advertisement for not less than two consecutive weeks in a newspaper of general circulation in Franklin county, and in such other publications as the commission determines, which notice shall state the general character of the work and the general character of the materials to be furnished, the place where plans and specifications therefor may be examined, and the time and place of receiving bids;

(2) Each bid shall contain the full name of every person or company interested in it and shall be accompanied by a sufficient bond or certified check on a solvent bank that if the bid is accepted a contract will be entered into and the performance of its proposal secured;

(3) The commission may reject any and all bids;

(4) A bond with good and sufficient surety, approved by the commission, shall be required of all contractors in an amount equal to at least fifty per cent of the contract price, conditioned upon the faithful performance of the contract;

(L) Employ consulting engineers, superintendents, managers, and such other engineers, construction and accounting experts, attorneys, and other employees and agents as are necessary in its judgment and to fix their compensation, provided all such expenses shall be payable solely from the proceeds of turnpike revenue bonds issued under sections 5537.01 to 5537.23, inclusive, of the Revised Code, or from revenues;

(M) Receive and accept from any federal agency, subject to the approval of the governor, grants for or in aid of the construction of any turnpike project, and receive and accept aid or contributions from any source of money, property, labor, or other things of value, to be held, used, and applied only for the purposes for which such grants and contributions are made;

(N) Provide coverage for its employees under sections 4123.01 to 4123.94, inclusive, and 4141.01 to 4141.46, inclusive, of the Revised Code;

(O) Do all acts necessary or proper to carry out the powers expressly granted in sections 5537.01 to 5537.23, inclusive, of the Revised Code.

§5537.05 Construction of grade separations; change of location of road; right of entry; reimbursement for damages. (GC §1206)

The commission shall have authority to construct grade separations at intersections of any turnpike project with public roads, state highways, and railroads and to change and adjust the lines and grades of such roads, highways, and railroads, and of public utility facilities, which change and adjustment of lines and grades of such roads and highways shall be subject to the approval of the director of highways so as to accommodate them to the design of such grade separation. The cost of such grade separation and any damage incurred in changing and adjusting the lines and grades of such roads, highways, railroads, and public utility facilities shall be ascertained and paid by the commission as a part of the cost of such turnpike project.

If the commission finds it necessary to change the location of any portion of any public road, state highway, railroad, or public utility facility, it shall cause the same to be reconstructed at such location as the division of government having jurisdiction over such road, highway, railroad, or public utility facility deems most favorable. Such construction shall be of substantially the same type and in as good condition as the original road, highway, or

railroad or public utility facility. The cost of such reconstruction, relocation, or removal and any damage incurred in changing the location of any such road, highway, railroad, or public utility facility, shall be ascertained and paid by the commission as a part of the cost of such turnpike project.

The commission shall have authority to petition the court of common pleas of the county wherein is situated any public road or part thereof affected by the location therein of any turnpike project, for the vacation or relocation of such road or any part thereof, with the same force and effect as is now given to the inhabitants of any township of such county. The proceedings upon such petition, whether for the appointment of appraisers or otherwise, shall be the same as provided by existing laws for similar proceedings upon such petitions.

The commission and its authorized agents and employees may, after proper notice, enter upon any lands, waters, and premises in the state for the purpose of making such surveys, soundings, drillings, and examinations as are necessary or proper for the purposes of sections 5537.01 to 5537.23, inclusive, of the Revised Code, and such entry shall not be deemed a trespass, nor shall an entry for such purposes be deemed an entry under any condemnation proceedings which may then be pending, provided that before entering upon the premises of any railroad notice shall be given to the superintendent of such railroad involved at least five days in advance of such entry, and provided that no survey, sounding, drilling, and examination shall be made between the rails or so close to a railroad track as would render such track unusable. The commission shall make reimbursement for any actual damage resulting to such lands, waters, and premises and to private property located in, on, along, over, or under such lands, waters, and premises, as a result of such activities. The state, subject to the approval of the governor, hereby consents to the use of all lands owned by it, including lands lying under water, which are necessary or proper for the construction or operation of

any turnpike project, provided adequate compensation is made for such use.

The commission shall also have power to make reasonable regulations for the installation, construction, maintenance, repair, renewal, relocation, and removal of public utility facilities in, on, along, over, or under any turnpike project. Whenever the commission determines that it is necessary that any such public utility facilities located on or after September 1, 1949, in, on, along, over, or under any turnpike project should be relocated in or removed from such turnpike project, the public utility owning or operating such facilities shall relocate or remove them in accordance with the order of the commission. The cost and expenses of such relocation or removal, including the cost of installing such facilities in a new location, the cost of any lands, or any rights or interests in lands, and any other rights, acquired to accomplish such relocation or removal, shall be ascertained and paid by the commission as a part of the cost of such turnpike project. In case of any such relocation or removal of facilities, the public utility owning or operating them, its successors, or assigns may maintain and operate such facilities, with the necessary appurtenances, in the new location, for as long a period and upon the same terms as it had the right to maintain and operate such facilities in their former location.

§5537.06 Appropriation of property and rights of way. (GC §1208)

The commission may acquire by appropriation any land, rights, rights of way, franchises, easements, or other property necessary or proper for the construction or the efficient operation of any turnpike project. In any proceedings for appropriation under this section, the procedure to be followed, the estate which shall vest in the state, and the right to possession which shall be acquired by the commission shall be as follows:

(A) The commission shall endeavor to agree with the owners, or the guardian or trustee of any owner, as to the compensation to be paid for the property.

(B) If the commission is unable to agree with any owner within a time considered by the commission to be reasonable, it shall declare, by resolution, that fact and the necessity of appropriating the property of said owner, and direct that proceedings to effect such appropriation be begun and prosecuted. Such resolution shall set forth the names and addresses, if known, of the owners of said property and contain a description of the property sought to be appropriated; whereupon, proceedings to appropriate shall be begun, prosecuted, and conducted as set out in this section.

(C) Such proceedings shall be begun and prosecuted either in the probate court or the court of common pleas, as the commission elects, of the county in which the property or a part thereof is situated, by filing application to which there shall be attached and made a part thereof a copy of the resolution of the commission.

(D) Notice of the filing of such application shall be given to all owners by serving a certified copy of said application in the manner of service of summons in civil actions. When the residence of the owners is unknown, and as to all who cannot be served within the state, notice shall be given by publishing the substance of the application, and a statement of the date of the filing thereof and of the date on and after which the matter may be heard, once a week for three consecutive weeks, in some newspaper of general circulation in the county, or shall be given by registered mail as provided by law. When service is made by publication, section 2703.16 of the Revised Code shall be complied with. When it appears that such notice has been given or waived, the court shall set the date for the assessment of compensation by the jury not earlier than five days after the return or waiver of service or after the last publication, but it may be made at a special term of court, and the jury shall proceed as in all civil cases. Said jury shall be drawn and qualified as juries in other civil actions in the court of common pleas.

(E) A view of the premises shall be ordered when demanded by a party to the proceedings. The owners shall have the right to open and close the case.

(F) If at the time of or after the filing of the application, it appears that any of the owners of the property sought to be taken are infants or insane, and have no guardian, a guardian ad litem shall be appointed in their behalf.

(G) No delay in the proceedings shall be occasioned by doubt as to the ownership of any property, or as to the interest of the respective owners, but in such cases the court shall retain the money deposited, as provided in this section, as compensation for the whole property, or the part in dispute, until the rights of the respective parties have been determined. As soon as the compensation assessed has been paid, or its payment secured by a deposit of money, under order of the court, possession of the property may be taken. Interest at the rate of six per cent per annum shall accrue from the date of taking. The commission's right to possession shall be enforced in the proceedings by writ of possession or other appropriate means.

(H) The jury, in its verdict, shall assess the compensation and damages, if any, to be paid to the owners. When a building or other structure is situated upon the land appropriated, or is situated partly upon the land appropriated and partly upon adjoining land so that such structure cannot be divided upon the line between such lands without manifest injury thereto, the jury, in assessing compensation to any owner of the land, shall assess the value thereof, exclusive of the structure, and make a separate finding of the value of the structure. The title to said structure shall vest in the state and the commission shall have the right to enter upon the adjoining land upon which any portion of the structure is located for the purpose of removing said structure therefrom. The verdict shall be signed by at least three fourths of the members of the jury.

(I) The jury shall be sworn to impartially assess the compensation and damages, if any, without deductions for benefit as to the property described in the application. If a jury is discharged from rendering a verdict, another shall be drawn and impaneled at the earliest convenient time, which shall make the inquiry and assessment.

(J) The commission, if it has not occupied or changed the property appropriated, may, at any time but not later than ninety days after the final determination of the cause, elect to abandon the appropriation proceedings upon the payment of the costs and reasonable attorney fees to be fixed by the court.

(K) Upon the payment or deposit of the amount assessed, an absolute estate in fee simple shall be vested in the state, as provided by sections 5537.01 to 5537.23, inclusive, of the Revised Code, unless a lesser estate or interest is asked for in the application, in which case such lesser estate or interest as is so asked for shall be vested.

(L) The commission may again appropriate, in conformity with sections 5537.01 to 5537.23, inclusive, of the Revised Code, any property which it has previously, lawfully appropriated in order to perfect, in it, a title in fee simple absolute to such previously appropriated property.

(M) The costs of the inquiry and assessment shall be paid as the court directs. At or after the time of filing said application, the commission may offer to confess judgment for the amount to be stated, and the costs then made, in favor of any owner, who in any manner enters an appearance, or upon whom service has been made. If such owner refuses to accept such offer and on the trial does not receive more, he shall pay all costs accruing after the offer, and an offer so made shall be governed by sections 2311.14 to 2311.20, inclusive, of the Revised Code, for an offer to confess judgment.

(N) The commission, or the owner of the property, the value of which has been assessed, as provided in this section, may prosecute an appeal as in other civil actions

to the court of appeals from the judgment of the probate court or the court of common pleas. The trial court, upon proper terms, may suspend the execution of any order, but in all cases where the commission pays or deposits the compensation assessed, and gives adequate security for any further compensation and costs, as required by the court, the right to take and use the property condemned shall not be affected by such review by the appellate courts.

(O) If the amount assessed by a jury is paid into court pursuant to judgment on the verdict, and if there is no doubt or dispute as to ownership requiring a determination by the court pursuant to division (G) of this section, the court may permit all or any part of the amount so deposited to be paid over to the owners, regardless of the pendency of any appeal or further proceedings. Interest shall cease to accrue upon the amount so paid over.

This section does not authorize the commission to take or disturb property or facilities belonging to any public utility or to a common carrier engaged in interstate commerce, which property or facilities are required for the proper and convenient operation of such public utility or common carrier, unless provision is made for the restoration, relocation, or duplication of such property or facilities elsewhere at the sole cost of the commission.

All proceedings brought under this section shall be governed by the law applicable in civil actions in the court of common pleas except as otherwise provided in this section, shall be advanced as a matter of immediate public interest and concern, and shall be heard in all courts at the earliest practicable moment.

§5537.07 Purchase of property and rights of way. (GC §1207)

The commission is hereby authorized and empowered to acquire by purchase, whenever it deems such purchase expedient, any land, property, rights, rights of way, franchises, easements, and other interests in lands as it deems

are necessary or convenient for the construction and operation of any turnpike project, upon such terms and at such price as it considers reasonable and can be agreed upon between the commission and the owner thereof, and take title thereto in the name of the state.

§5537.08 Procedure for issuance of turnpike revenue bonds; use and disbursement of proceeds; interim receipts or temporary bonds. (GC §1209)

The commission is hereby authorized to provide by resolution, at one time or from time to time, for the issuance of turnpike revenue bonds of the state for the purpose of paying any part of the cost of any one or more turnpike projects. The principal of and the interest on such bonds shall be payable solely from the funds provided by sections 5537.01 to 5537.23, inclusive, of the Revised Code, for such payment. The bonds of each issue shall be dated, shall bear interest at a rate or rates not to exceed five per cent per annum, shall mature at such time or times, not to exceed forty years from their date or dates, as is determined by the commission, and may be made redeemable before maturity, at the option of the commission, at such price or prices and under such terms and conditions as are fixed by the commission prior to the issuance of the bonds. The commission shall determine the form of the bonds, including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the bonds and the place or places of payment of principal and interest, which may be at any bank or trust company within or without the state.

The bonds shall be signed by the chairman and vice-chairman of the commission or by their facsimile signatures, the official seal of the commission shall be affixed thereto and attested by the secretary-treasurer of the commission, and any coupons attached thereto shall bear the facsimile signature of the chairman of the commission. In case any officer whose signature, or a facsimile of whose

signature, appears on any bonds or coupons ceases to be such officer before delivery of bonds, such signature or facsimile shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until such delivery.

All bonds issued under sections 5537.01 to 5537.23, inclusive, of the Revised Code, shall have all the qualities and incidents of negotiable instruments under the negotiable instruments law of this state. The bonds may be issued in coupon or in registered form, or both, as the commission determines, and provision may be made for the registration of any coupon bonds as to principal alone and also as to both principal and interest, and for the reconversion into coupon bonds of any bonds registered as to both principal and interest. The commission may sell such bonds in the manner and for the price it determines to be for the best interest of the state, but no such sale shall be made at a price so low as to require the payment of interest on the money received therefor at more than five per cent per annum, computed with relation to the absolute maturity of the bonds in accordance with standard tables of bond values excluding from such computation the amount of any premium to be paid on redemption of any bonds prior to maturity.

The proceeds of the bonds of each issue shall be used solely for the payment of the cost of the turnpike project or projects for which such bonds were issued, and shall be disbursed in such manner and under such restrictions as the commission provides in the resolution authorizing the issuance of such bonds or in the trust agreement, as provided by section 5537.12 of the Revised Code, securing the same. If the proceeds of the bonds of any issue, by error of estimates or otherwise, are less than such cost, additional bonds may, in like manner, be issued to provide the amount of such deficit, and, unless otherwise provided in the resolution authorizing the issuance of such bonds or in the trust agreement securing the same, are deemed to be of the same issue and shall be entitled to payment from the same fund, without preference or priority of the

bonds first issued. If the proceeds of the bonds of any issue exceed the cost of the turnpike project or projects for which such bonds were issued, the surplus shall be deposited to the credit of the sinking fund for such bonds.

Prior to the preparation of definitive bonds, the commission may, under like restrictions, issue interim receipts or temporary bonds, with or without coupons, exchangeable for definitive bonds when such bonds have been executed and are available for delivery. The commission may also provide for the replacement of any bonds which become mutilated or are destroyed or lost. Bonds may be issued under sections 5537.01 to 5537.23, inclusive, of the Revised Code, without obtaining the consent of any department, division, commission, board, bureau, or agency of the state, and without any other proceedings, or the happening of any other conditions or things than those proceedings, conditions, or things which are specifically required by such sections.

§5537.09 Turnpike revenue refunding bonds. (GC §1210)

The commission is hereby authorized to provide by resolution for the issuance of turnpike revenue refunding bonds of the state, payable solely from revenues, for the purpose of refunding any bonds then outstanding which have been issued under sections 5537.01 to 5537.23, inclusive, of the Revised Code, including the payment of any redemption premium thereon and any interest accrued or to accrue to the date of redemption of such bonds, and, if deemed advisable by the commission, for the additional purpose of constructing improvements, extensions, or enlargements of the turnpike project in connection with which the bonds to be refunded have been issued. The issuance of such bonds the maturities and other details thereof, the rights of the holders thereof, and the rights, duties, and obligations of the commission in respect to such bonds shall be governed by such sections in so far as they are applicable.

§5537.10 Turnpike bonds need not comply with other laws applicable to issuance of bonds. (GC §1221)

Sections 5537.01 to 5537.23, inclusive, of the Revised Code provide an additional and alternative method for doing the things authorized thereby. Such sections shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers existing on September 1, 1949. The issuance of turnpike revenue bonds or turnpike revenue refunding bonds under such sections need not comply with any other law applicable to the issuance of bonds.

§5537.11 Turnpike revenue bonds not a debt of the state. (GC §1202)

Turnpike revenue bonds issued under sections 5537.01 to 5537.23, inclusive, of the Revised Code, do not constitute a debt, or a pledge of the faith and credit, of the state or of any political subdivision thereof, but such bonds shall be payable solely from the funds pledged for their payment as authorized by such sections, unless the bonds are refunded by refunding bonds, issued under sections 5537.01 to 5537.23, inclusive, of the Revised Code, which refunding bonds shall be payable solely from funds pledged for their payment as authorized by such sections. All such turnpike revenue bonds shall contain on the face thereof a statement to the effect that the bonds, as to both principal and interest, are not an obligation of this state or of any political subdivision thereof, but are payable solely from revenues pledged for their payment.

All expenses incurred in carrying out sections 5537.01 to 5537.23, inclusive, of the Revised Code, shall be payable solely from funds provided under such sections. Such sections do not authorize the commission to incur indebtedness or liability on behalf of or payable by the state or any political subdivision thereof.

§5537.12 Trust agreement for security of bonds. (GC §1213)

In the discretion of the commission any bonds issued under sections 5537.01 to 5537.23, inclusive, of the Revised Code, may be secured by a trust agreement between the commission and a corporated trustee, which trustee may be any trust company or bank having the powers of a trust company within or without the state.

Any such trust agreement may pledge or assign the tolls and other revenue to be received, but shall not convey or mortgage any turnpike project or any part thereof. Any such trust agreement or any resolution providing for the issuance of such bonds may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as are reasonable and proper and not in violation of law, including covenants setting forth the duties of the commission in relation to the acquisition of property, and the construction, improvement, maintenance, repair, operation, and insurance of the turnpike project or projects in connection with which such bonds are authorized, the rates of toll to be charged, and the custody, safeguarding, and application of all moneys, and provisions for the employment of consulting engineers in connection with the construction or operation of such turnpike project or projects. Any bank or trust company incorporated under the laws of this state which may act as depository of the proceeds of bonds or of revenue may furnish such indemnifying bonds or may pledge such securities as are required by the commission. Any such trust agreement may set forth the rights and remedies of the bondholders and of the trustee, and may restrict the individual right of action by bondholders as is customary in trust agreements or trust indentures securing bonds or debentures of corporations. Such trust agreement may contain such other provisions as the commission deems reasonable and proper for the security of the bondholders. All expenses incurred in carrying out the provisions of any such trust agreement may be treated as a part of the cost of the operation of the turnpike project or projects.

§5537.13 Contracts; bids; tolls; sinking fund; lien of the pledge. (GC §1214)

The commission is hereby authorized to fix, revise, charge, and collect tolls for the use of each turnpike project and any extension or sections thereof, and contract in the manner provided by this section with any person, partnership, association, or corporation desiring the use of any part thereof, including the right of way adjoining the paved portion, for placing thereon telephone, telegraph, electric light, or power lines, gas stations, garages, stores, hotels, and restaurants, or for any other purpose, and fix the terms, conditions, rents, and rates of charge for such, provided that no toll, charge, or rental is made by the commission for placing in, on, along, over, or under such turnpike project, such telephone, telegraph, electric light, or power lines, equipment, or facilities as are necessary to serve establishments located on the turnpike project or to interconnect any public utility facilities, and, provided that a sufficient number of gas stations may be authorized to be established in each service area to permit reasonable competition by private business in the public interest.

Contracts for the operation of gas stations, garages, stores, hotels, restaurants, parking facilities, or other purposes shall be made in writing with the bidder whose bid in consideration of the public interest, is determined by the commission to be the best bid received, after advertisement for two consecutive weeks in a newspaper of general circulation in Franklin county, and in such other publications as the commission determines. Such notice shall state the general character of the operation proposed, the place where plans and specifications may be examined, and the time and place of receiving bids. Bids shall contain the full name of each person or company interested in them, and shall be in such form as the commission requires. The commission may reject any and all bids. All contracts shall be preserved in the principal office of the commission.

Tolls shall be so fixed and adjusted in respect to the aggregate of tolls on each turnpike project, including any extension or section thereof, in connection with which the bonds of any issue have been issued as to provide a fund sufficient, with other revenue from such turnpike project or extensions or sections thereof to pay:

(A) The cost of maintaining, repairing, and operating such turnpike project or extension or sections thereof;

(B) The principal of and the interest on such bonds as such principal and interest becomes due and payable, and to create reserve for such purposes. Such tolls shall not be subject to supervision or regulation by any other commission, board, bureau, or agency of the state.

The tolls and all other revenues derived from each turnpike project or extension or sections thereof in connection with which the bonds of any issue have been issued, except such part thereof as are necessary to pay such cost of maintenance, repair and operation and to provide such reserves therefor as are provided for in the resolution authorizing the issuance of such bonds or in the trust agreement securing the bonds, shall be set aside, at such regular intervals as are provided in the resolution or agreement, in a sinking fund which is hereby pledged to and charged with the payment of the principal of and the interest on such bonds as they become due, and the redemption price or the purchase price of bonds retired by call or purchase as therein provided. Such pledge shall be valid and binding from the time the pledge is made; the tolls or other revenues or moneys so pledged and thereafter received by the commission shall immediately be subject to the lien of such pledge without any physical delivery thereof or further act, and the lien of any such pledge shall be valid and binding as against all parties having claims of any kind in tort, contract, or otherwise against the commission, irrespective of whether such parties have notice thereof. Neither the resolution nor any trust agreement by which a pledge is created need be filed or recorded except in the records of the commission.

The use and disposition of moneys to the credit of such sinking fund shall be subject to the resolution authorizing the issuance of such bonds or of such trust agreement. Except as is otherwise provided in such resolution or trust agreement, such sinking fund shall be a fund for all such bonds, without distinction or priority of one over another.

§5537.14 Trust funds. (GC §1215)

All moneys received under sections 5537.01 to 5537.23, inclusive, of the Revised Code, whether as proceeds from the sale of bonds or as revenues, are trust funds, to be held and applied solely as provided in such sections. Such funds shall be kept in depositories as selected by the commission in the manner provided in sections 135.01 to 135.23, inclusive, of the Revised Code, in so far as such sections are applicable, and the deposits shall be secured as provided in sections 135.01 to 135.23, inclusive of the Revised Code. The resolution authorizing the issuance of bonds of any issue or the trust agreement securing such bonds shall provide that any officer to whom, or any bank or trust company to which, such moneys are paid shall act as trustee of such moneys and hold and apply them for the purposes hereof, subject to such regulations as sections 5537.01 to 5537.23, inclusive, of the Revised Code, and such resolution or trust agreement provide.

§5537.15 Rights of bondholders and trustees. (GC §1216)

Any holder of bonds issued under sections 5537.01 to 5537.23, inclusive, of the Revised Code, or any of the coupons appertaining thereto, and the trustee under any trust agreement except to the extent the rights given by such sections may be restricted by such trust agreement, may by suit, action, mandamus, or other proceedings, protect and enforce any rights under the laws of the state or granted under such sections, trust agreement, or the resolution authorizing the issuance of such bonds, and may enforce and compel the performance of all duties required by such sections, or by the trust agreement or

resolution, to be performed by the commission or any officer thereof, including the fixing, charging, and collecting of tolls.

§5537.16 Bylaws, rules, and regulations. (GC §1217)

The commission shall have power to adopt such bylaws, rules, and regulations as it may deem advisable for the control and regulation of traffic on any turnpike project, for the protection and preservation of property under its jurisdiction and control, and for the maintenance and preservation of good order within the property under its control. Such bylaws, rules, and regulations shall be published in a newspaper of general circulation in Franklin county, and in such other manner as the commission prescribes.

Such rules and regulations shall provide that public police officers shall be afforded ready access, while in the performance of their official duty, to all property under the jurisdiction of the commission without the payment of tolls.

No person shall violate any such bylaws, rules, or regulations. All fines collected for any such violation shall be paid into the treasury of the commission.

§5537.17 Maintenance and repair of turnpike project; restoration or repair of damaged property; co-operation by political subdivisions. (GC §1218)

Each turnpike project, when constructed and opened to traffic shall be maintained and kept in good condition and repair by the commission. Each such project shall also be policed and operated by such force of police, tolltakers, and other operating employees as the commission employs.

All public or private property damaged or destroyed in carrying out the powers granted by sections 5537.01 to 5537.23, inclusive, of the Revised Code, shall be restored or repaired and placed in its original condition, as nearly as practicable, or adequate compensation made therefor out of funds provided under such sections.

All counties, municipal corporations, townships, and other political subdivisions, and all public agencies and commissions of the state notwithstanding any contrary provision of law are hereby authorized and empowered to lease, lend, grant, or convey to the commission, at its request, upon such terms as the proper authorities of such counties, municipal corporations, townships other political subdivisions or public agencies and commissions of the state deem reasonable and fair and without the necessity for an advertisement, order of court, or other action or formality, other than the regular and formal action of the authorities concerned, any real property which is necessary or convenient to the effectuation of the authorized purposes of the commission, including public roads and other real property already devoted to public use.

On or before the first day of February, in each year, the commission shall make an annual report of its activities for the preceding calendar year to the governor and the general assembly. Each such report shall set forth a complete operating and financial statement covering the commission's operations during the year. The commission shall cause an audit of its books and accounts to be made at least once each year by certified public accountants and the cost thereof may be treated as a part of the cost of construction or of operations of the project.

§5537.18 Interest in contracts. (GC §1218)

Any member, agent, or employee of the commission who is interested, directly or indirectly, in any contract of another person with the commission, or in the sale of any property, real or personal to the commission shall be punished as provided by division (B) of section 5537.99 of the Revised Code. This section does not apply to contracts or purchases of property, real or personal, between the commission and other departments or subdivisions of state government.

§5537.19 Study of turnpike project; expenses; reimbursement. (GC §1220)

With the approval and the consent of the controlling board, the director of highways shall expend, out of any funds available for the purpose, such moneys as are necessary for the study of any turnpike project, and may use its engineering and other forces, including consulting engineers and traffic engineers, for the purpose of effecting such study. All such expenses incurred by the director prior to the issuance of turnpike revenue bonds under sections 5537.01 to 5537.23, inclusive, of the Revised Code, shall be paid by the director and charged to the appropriate turnpike project, and the director shall keep proper records and accounts showing the amounts so charged. Upon the sale of turnpike revenue bonds for any turnpike project, the funds so expended by the director, with the approval of the commission, in connection with such project, shall be reimbursed to the department from the proceeds of such bonds.

§5537.20 Turnpike project, property income, and bonds free from taxation. (GC §1212)

The exercise of the powers granted by sections 5537.01 to 5537.23, inclusive, of the Revised Code, will be in all respects for the benefit of the people of the state, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions, and as the operation and maintenance of turnpike projects by the commission will constitute the performance of essential governmental functions, the commission shall not be required to pay any taxes or assessments upon any turnpike project, or upon any property acquired or used by the commission under sections 5537.01 to 5537.23, inclusive, of the Revised Code, or upon the income therefrom, and the bonds issued under such sections, their transfer, and the income therefrom, including any profit made on the sale thereof, shall at all times be free from taxation within the state.

§5537.21 Turnpike project to become part of state highway system and free of tolls (GC §1219)

When all turnpike bonds issued under sections 5537.01 to 5537.23, inclusive, of the Revised Code in connection with any turnpike project or extension or sections thereof and the interest thereon have been paid, or a sufficient amount for the payment of all such bonds and the interest thereon, to the maturity thereof has been set aside in trust for the benefit of the bondholders such project or extension or sections thereof, if then in good condition and repair to the satisfaction of the director of highways, shall become part of the state highway system, shall thereafter be maintained by the department of highways, and shall be free of tolls.

§5537.22 Journal (GC §1211)

All final actions of the commission shall be journalized and such journal shall be open to the inspection of the public at all reasonable times.

§5537.23 Liberal construction of sections. (GC §1222)

Sections 5537.01 to 5537.23, inclusive, of the Revised Code being necessary for the welfare of the state and its inhabitants shall be liberally construed to effect the purposes thereof.

§5537.99 Penalties.

(A) Whoever violates section 5537.16 of the Revised Code shall be fined not more than fifty dollars for a first offense; for each subsequent offense such person shall be fined not more than five hundred dollars.

(B) Whoever violates section 5537.18 of the Revised Code shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both.

Comment

This section is derived from GC §§ 1217 and 1218. See also RC §§5537.16 and 5537.18.

APPENDIX B

ENTRY ON VERDICT

IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

Matter of Appropriation by Ohio Turnpike Commission of Property of Cooley Ellis, et al. } No. 177828

ENTRY ON VERDICT

(Filed November 30, 1953)

This cause came on to be heard upon the application of the Ohio Turnpike Commission for the assessment of compensation and damages. Thereupon on November 16, 1953 a jury was impanelled and sworn. The issues as to compensation and damages were submitted to said jury, and after due deliberation, said jury returned a verdict for $12,265.00 as compensation for the property taken and $32,081.50 as damages to the residue of the property, such verdict thus being for the total sum of $44,346.50.

In conformity with said verdict, it is hereby ordered, adjudgded, and decreed that the Ohio Turnpike Commission shall deposit in this Court the said sum of $44,346.50 which sum shall be paid by the Clerk, pursuant to subsequent order of the court, to the owners herein as their interests may appear upon a hearing for distribution.

Further, in conformity with said verdict, it is ordered, adjudged, and decreed that the property, easements, rights, and restrictions described in the application, the same being more particularly described as follows:

Parcel No. 51-G—Fee Simple

Situated in the City of Toledo, County of Lucas and State of Ohio and known as being part of Private Grant No. 580 in the United States Reserve and being all that part of the lands described in the deed to Cooley Ellis, dated January 29, 1948 and recorded in Volume 1291, page 221 of Lucas County Deed Records lying within a strip of land 300 feet wide between parallel lines, the Northeasterly line of said strip being parallel to and distant 150 feet Northeasterly, measured on a line normal to, the center line of Ohio Turnpike Project No. 1, as shown by plat recorded in Volume 50, page 18 of Lucas County Map Records, and the Southwesterly line of said strip being parallel to and distant 150 feet Southwesterly, measured on a line normal to said center line.

Parcel No. 51-G(1)—Permanent Easement for Highway Purposes

Situated in the City of Toledo, County of Lucas and State of Ohio and known as being part of Private Grant No. 580 in the United States Reserve and being all that part of the lands described in the deed to Cooley Ellis, dated January 29, 1948 and recorded in Volume 1291, page 221 of Lucas County Deed Records:

Beginning on the Northeasterly line of Ogontz Subdivision as shown by the recorded plat in Volume 21 of Maps, page 27 of Lucas County Records at its intersection with a line being parallel to and distant 159 feet Northeasterly, measured on a line normal to the center line of Ohio Turnpike Project No. 1, as shown by the recorded plat in Volume 50 of Maps, page 18 of Lucas County Records; thence Southeasterly along said parallel line to a point on a line drawn radially Southeasterly from Station 2+34.38 on line A, (said line A being described as follows: Beginning on the center line of Ohio Turnpike Project No. 1 as aforesaid at Station 720+17.72; thence Northeasterly along a line forming an angle of 49° 50′ 23″ in the Easterly quad-

rant 232.31 feet to a point of curvature; thence along a line curving to the right forming a central angle of 13° 16′ 40″ and a radius of 716.20 feet to a point of tangency; thence Northeasterly on a line tangent to said curve 157.31 feet to a point of curvature; thence along a line curving to the left forming a central angle of 13° 45′ 00″ and a radius of 716.20 feet to a point on the Southwesterly line of the Replat of Vanderbilt Terrace, an Addition recorded in Volume 46 of Maps, page 64 of Lucas County Records); thence Northeasterly along a line parallel to and distant 45 feet Southeasterly, measured on a line normal to line A as aforesaid to a point distant 45 feet Southeasterly, measured on a line normal to line A as aforesaid at Station 4f 50; thence Northwesterly along said normal line to 10 feet; thence Northeasterly along a line parallel to and distant 35 feet Southeasterly, measured on a line normal to line A as aforesaid to a point distant 35 feet Southeasterly, measured on a line normal to line A as aforesaid, to a point distant 35 feet Southeasterly, measured on a line normal to the center line of line A as aforesaid at Station 6+50; thence Northwesterly along said normal line 5 feet; thence Northeasterly along a line parallel to and distant 30 feet Southeasterly, measured on a line normal to line A as aforesaid to a point on the Southwesterly line of the Replat of Vanderbilt Terrace as aforesaid; thence Northwesterly along said Southwesterly line 60 feet; thence Southwesterly along a line parallel to and distant 30 feet Northwesterly, measured on a line normal to line A as aforesaid to a point distant 30 feet Northwesterly, measured on a line normal to line A as aforesaid at Station 6f 50; thence Northwesterly along said normal line 5 feet; thence Southwesterly along a line parallel to and distant 35 feet Northwesterly, measured on a line normal to line A as aforesaid to a point distant 35 feet Northwesterly, measured on a line normal to line A as aforesaid at Station 4+50; thence Northwesterly along said normal line 5 feet; thence Southwesterly along a line parallel to and distant 40 feet Northwesterly, mea-

sured on a line normal to line A as aforesaid to a point distant 40 feet Northwesterly, measured on a line normal to line A as aforesaid at Station 3+50; thence Northwesterly along said normal line 10 feet; thence Southwesterly along a line parallel to and distant 50 feet Northwesterly, measured on a line normal to line A as aforesaid to a point distant 50 feet Northwesterly, measured on a line normal to line A as aforesaid at Station 2+45; thence Northwesterly along a line drawn from a point distant 50 feet Northwesterly, measured on a line normal to line A as aforesaid at Station 2+45 to a point distant 180 feet Northeasterly, measured on a line normal to the center line of Ohio Turnpike Project No. 1 as aforesaid at Station 716+50 to the Northeasterly line of Ogontz Subdivision as aforesaid; thence Southeasterly along said Northeasterly line to the place of beginning.

The aforementioned rights and restrictions to be appropriated are as follows:

First: Any and all abutters' rights, including access rights, appurtenant to any remaining portion of the lands of said owner or owners of which the above-described real estate shall have formed a part prior hereto, in, over, or to the parcel described above as Parcel No. 51-G, including such rights to any turnpike constructed thereon.

Second: All rights to erect on any of the aforesaid remaining lands any billboard, sign, notice, poster, or other advertising device which would be visible from the travelway of Ohio Turnpike Project No. 1, and which is not now upon said lands.

be and the same hereby are duly vested in the State of Ohio, free and clear of all claims of the owners of said land and persons having interests therein, to-wit: Cooley Ellis, Mary Ellis, Ruth E. Slater, formerly Ruth E. Ellis, Joel S. Rhinefort, The Ohio Citizens Trust Company, County Auditor of Lucas County and County Treasurer of Lucas County.

To the foregoing findings, orders, judgments, and decrees, and each of them, the owners Cooley Ellis and Mary Ellis, separately except.

It is further ordered that the Ohio Turnpike Commission pay all court costs herein accrued and that a record be made of these proceedings according to law.

Hackett, J.
Judge.

Frank C. Dunbar, Jr., General Counsel,
James L. Stegmeier, Condemnation Attorney,

Fuller, Warrington, Seney & Henry,
Special Counsel for Ohio Turnpike
Commission.

Taylor, Cruey & Kelb,
Attorneys for Cooley Ellis
and Mary Ellis.

OPINION

IN THE COURT OF APPEALS OF OHIO
LUCAS COUNTY, SIXTH DISTRICT

In the Matter of Appropriation of the Property of Cooley Ellis by Ohio Turnpike Commission.	No. 4777

OPINION

February 21, 1955

(Hurd P. J., Kovachy J., Skeel J. of Eighth District, sitting by designation in the Sixth District.)

Appearances: For Plaintiff Appellant: Taylor, Cruey & Kelb, 529 Security Building, Toledo, Ohio. For Defendant Appellee: Frank C. Dunbar, Jr., General Counsel, 139 East Gay St., Columbus, Ohio; Fuller, Harrington, Seney & Henry, 807 Ohio Building, Toledo, Ohio.

Hurd, P. J.

This appropriation case is here appealed on questions of law from a judgment rendered upon the verdict of a jury in the Court of Common Pleas of Lucas County. Plaintiff appellant is Cooley Ellis the landowner, and the defendant appellee is the Ohio Turnpike Commission.

This appeal involves a proceeding instituted by the Commission to appropriate a right of way and a permanent easement over lands of Ellis which fronted 645.43 feet on Seventh Avenue in the City of Toledo and extended back to the Wabash Railroad on Radford Road and Ogontz Avenue, 3422.94 feet, or about ⅔ of a mile.

The jury returned a verdict for Ellis in the sum of $12,265.00 as compensation for the property taken and $32,081.50 as damages to the residue, or a total sum of $44,346.50 for which judgment was rendered December 1, 1953.

It is claimed by Ellis that the compensation and damages awarded are "grossly inadequate" and that the court erred in many respects set forth in the assignments of error, as follows:

"1. The court erred in its failure to dismiss for want of jurisdiction at the preliminary hearing.

2. The court erred in excluding from the evidence the plans for development of the tract for apartment houses and the fact that application for F. H. A. financing had been made.

3. The court erred in the admission of evidence as to the cost of the property in 1947.

4. The court erred in failing to limit the evidence of the cost of the property.

5. The court erred in admitting a purported financial statement of Ellis.

6. The court erred in permitting the witness, Schenck, to testify.

7. The court erred in permitting evidence as to the cost of other properties.

8. The court erred in instructing the jury as to the value of testimony of experts.

9. The court erred in its instructions as to billboard and sign rights, and in failing to charge in relation to abutter's rights appropriated.

10. The verdict was manifestly against the weight of the evidence.

1. There was misconduct on the part of a juror."

The first assignment of error to the effect that the trial court erred in its failure to dismiss the petition for want of jurisdiction at the preliminary hearing, cannot be sustained, in view of the decision of the Supreme Court in Ellis v. Turnpike Commission, 162 O. S. 86, for further discussion of which see decision and opinion in equity appeal No. 4757, entitled Ellis v. Turnpike Commission, entered by this court November 24, 1954.

Proceeding to the second assignment of error, it is claimed that the trial court erred prejudicially in sustaining objections to the introduction of certain plans for the development of part of the subject property for multiple family dwellings. The record shows that five acres of the tract fronting on Seventh Avenue were zoned for commercial purposes and that the remainder of the tract was zoned for multiple family dwellings or apartment houses. Expert testimony was offered tending to show that the highest and best use of this remainder would be for multiple family dwellings; that because of its location on the Anthony Wayne Trail, which presently is the only limited access express highway in Toledo, the property is excellently situated for a large scale apartment house development.

The record further shows that in the year 1948, long prior to the commencement of the instant proceedings and without any knowledge that the land would eventually be sought by the State for Turnpike purposes, Ellis had em-

ployed one Leonard H. Gerow, an architect of the firm of Gerow & Conklin of Toledo, for the purpose of drafting plans for the construction of 625 apartments to be built on the back 45.93 acres of this tract. The plans thus prepared were offered in evidence by Ellis as Exhibits 12 to 15, both inclusive, to show that the highest and best use of that part of the property would be for multiple family dwellings. The offers were made separately as to each exhibit and overruled as to each. The trial court in sustaining objections to the introduction of these exhibits, said in part:

> "* * * it is not permissible, and in our opinion would be error for the court to admit in evidence plans and specifications for any specific project which is not actually in existence on the premises or which is not even under construction."

That this conclusion was erroneous is clear from an examination of the cases of Railway v. Longworth, 30 O. S. 108; Goodin v. Canal Co., 18 O. S. 169; Sowers Supt. v. Schaeffer, 155 O. S. 454; Langaneau Mfg. Co. v. Cleveland, 159 O. S. 525.

In the case of Railway v. Longworth, supra, it appears that in the appropriation proceedings, the executors for the land owner offered before the Probate Court

> "to prove to the jury that long prior to the commencement of these proceedings they caused their tract of land in Loeland * * * to be subdivided and laid off into lots, streets and alleys for the purpose of selling the same and caused a plat of such subdivision to be made of record but which had not yet been recorded and offered to put said plat in evidence to the jury as tending to show the availability of such property for subdivision into small lots *and its value thus subdivided.*" (Emphasis ours.)

The trial court ruled "that as defendants' plot had not been recorded nor represented a town plat, dedicated in pais, it could not be offered in evidence for any purpose, upon the issue before the jury, except to show the general

location of the property, the course of the proposed railroad through the same and the availability of the property for subdivision into smaller lots."

It will be noted that the offer in the Longworth case was allowed for limited purposes only, whereas in the case at bar the offer was rejected in toto.

The Supreme Court, in affirming a judgment of reversal of the Probate Court by the Common Pleas Court and the District Courts, held inter alia, that such plat was admissible and that it was prejudicial error to exclude it.

At page 111, the Supreme Court said in part:

> "If it (the land) was more valuable in the particular mode in which it had been subdivided into lots, that fact might also be shown and *in connection with such proof a diagram or plat of such subdivision was admissible, though unrecorded not as a town plat but as a diagram or plan for increasing the value of property in the market.*" (Emphasis added.)

In the course of the opinion the court cited and quoted with approval from the early case of The Queen v. Brown, L. R. 2 Q. B. 630, in part as follows:

> "A jury, whether the dispute be as to the value of land required to be taken by the company, or as compensation for damages by severance, in assessing the amount to which the land owner is entitled, have to consider the real value of the land and may take into account not only the present purpose to which the land is applied, but also any other more beneficial purpose to which, in the course of events at no remote period, it may be applied, just as an owner might, if he were bargaining with a purchaser in the market place. * * *"

The decision in Railroad v. Longworth, supra, stands unreversed and unmodified to this date, although recorded in 1887. In view of this decision, we believe that the argument of counsel for the Commission that "the fact that five years before the owner had employed an architect to

prepare plans for multiple dwellings would have no probative value" is untenable, since the analogy between the Longworth case and the instant case is immediately apparent and unmistakable.

The rule in appropriation cases as there stated is that:

> "the jury are to take into consideration the real value of land taken and the diminished value to the remainder and may for that purpose take into account not only the purposes to which the land is or has been applied, but any other beneficial purpose to which it may be applied which would affect the amount of compensation or damages."

See Railway v. Longworth, supra, second syllabus.

This holding is likewise in harmony with the rule stated in the later case of In re Appropriation by Supt. of Public Works: Sowers, Supt. v. Schaefer, 155 O. S. 454 (1951) as follows:

> "The rule of valuation in a land appropriation proceeding is not what the property is worth for any particular use, but what it is worth generally for any and all uses for which it might be suitable, *including the most valuable uses to which it can reasonably and practically be adapted.*" (Parag. 3 of syllabus.) (Emphasis added.)

And at page 458, the court said:

> "The true value of anything is what it is worth when applied to its natural and legitimate uses—*its best and most valuable uses.* Goodin v. Ginn. & Whitewater Canal Co. 18 O. S. 169." (Emphasis added.)

For a further discussion of the correct interpretation of the Goodin and Schaefer cases, see our opinion in Ellis v. Turnpike, appeal No. 4778.

The recent case of Langaneau Mfg. Co. v. Cleveland, 159 O. S. 525, (1953) is likewise conclusive on the subject, where the court held as appears in the third syllabus:

> "3. *It is the duty of the court in an appropriation proceedings to afford the property owner the right to fully show the extent and character of the real estate proposed to be taken and its maximum value for any purpose for which its use is available, including the use which is presently made of it.*" (Emphasis added.)

The argument advanced by appellee that oral testimony had been permitted in respect to these matters, does not cure the error of refusing to admit the plans into evidence. Neither is the error cured by the admission in evidence of Ellis' Exhibit 11, showing a "grouping plan" of the entire tract. The rule of law which allowed the admission in evidence of Exhibit 11, prepared by the same architects is equally applicable to Exhibits 12 to 15, inclusive, which the court refused to admit in evidence. Visual evidence is of immeasurable value for demonstrative purposes. The familiar saying in journalistic circles that "one picture is worth ten thousand words" is peculiarly applicable here as the expert witnesses for the land owner would have been able to demonstrate by the use of the plans the claimed most valuable and best uses of the property and conversely, the expert witnesses for the Commission would have had equal opportunity to testify as to their opinions in respect thereof. The jury would thus be in a position to relate the visual evidence to the oral testimony on the subject in a most advantageous manner, without prejudice to either party. In any event, the proffered evidence was competent and should have been admitted.

Counsel for the Commission have cited and quoted from cases of many other jurisdictions which are of interest from an academic viewpoint, but which cannot be considered as authority in Ohio, in view of the decision in Railway vs Longworth, and the related cases cited, supra.

It is our conclusion, therefore, that Assignment of Error No. 2 must be sustained, holding as we do that the rejection in evidence of the plans offered as Exhibits 12 to 15, both inclusive, constituted error prejudicial to the rights of the party complaining.

We proceed now to a consideration of Assignment of Error No. 3 and No. 4, to the effect that the court erred in the admission of evidence as to the purchase price of the property in question in 1947, and that the court erred in failing to limit the evidence of the cost of the property.

It appears that Ellis acquired the property in 1947 but that the deed was not delivered until January, 1948. The appropriation resolution in this case was adopted September 1, 1953, and the trial was held in November, 1953. Thus it appears that trial was had some six years after the purchase of the property.

It is claimed by Ellis that the neighborhood had changed considerably and that the growth of the city was out toward Maumee along the Anthony Wayne Trail, resulting in a change of zoning and that it was error on the part of the trial court to permit counsel for appellee to cross-examine Ellis, over objection of his counsel, as to the price paid for the land. The evidence indicates that the subject premises were unimproved both at the time of purchase and at the time of trial. The trial court in ruling on this issue stated:

> "It appears that the property is in the same condition as when it was acquired by Ellis."

Counsel for appellant have cited cases from other jurisdictions and text authorities to the effect that when in an appropriation case the purchase took place several years prior to the taking, evidence of the price paid for the land is not admissible. On this question there is definitely a division of authority. However, the law in Ohio, while not entirely clear, is apparently contrary to the contention of appellant. The Ohio case upon which appellant relies is Schaaf vs State, ex rel Waid, 11 Oh. Law Abst. 466

(1931) decided by the 5th District Court of Appeals, Dec. 18, 1931, the syllabus of which reads as follows:

> "When defendants in an appropriation proceedings put in evidence a deed dated three years previously at which time the land was purchased at judicial sale, for the specific purpose of showing amount and title, it is prejudicial error to allow argument and comment on the price stated therein, since the only issue to be tried is the present value of the property."

The judgment in that case was reversed by the Supreme Court in Waid, Director of Highways, vs Schaaf, et al, 127 O. S. 274 and the judgments of the Common Pleas Court and Probate Court were affirmed. The sole reason assigned for reversing the judgment however, was that the deed designated as "Exhibit C" was not introduced in evidence in the Probate Court. An examination of the opinion of the Court of Appeals indicates that the sale of the property in question was a judicial sale from which we infer that it may have been a forced sale which, if true, would not be competent evidence in any event as the rule applies only to voluntary sales.

Counsel for the Commission in support of their contention have cited and quoted from cases of other jurisdictions and have cited and quoted from 5 Nichols on Eminent Domain, Sec. 21.2; 1 Orgel on Valuation, Eminent Domain, Sec. 36, and also Sec. 136, p. 581, which indicate that the admissibility of such evidence is largely within the sound discretion of the trial court on cross-examination. Counsel also cite and quote from the decision of the Circuit Court of Cuyahoga County in Cleveland T. & V. R. R. vs Gorsuch et al, 8 O. C. C. (N. S.) 297, where, in a railroad condemnation proceeding, the defendant was asked on cross-examination what he had paid for the property. In holding that the trial court erred in sustaining an objection to this inquiry, the appellate court said:

> "* * * The price paid does not fix the value, nor does the value fourteen months prior to the time at which value is now to be determined, even when fixed, determine the present value but both having a bearing on present value and are admissible in evidence as tending to show present value * * *."

This judgment of the Circuit Court was affirmed by the Supreme Court without opinion. 76 O. S. 609. It will be noted that the sale in that case was fourteen months prior to the time of the taking which indicates that it was considered to be a recent sale.

It would indeed be difficult to fix an arbitrary rule as to the period of time within which the purchase price of the subject property should be either admitted in evidence or excluded.

Frequently there are many other factors involved, such as changed conditions in the subject property, including buildings and other improvements thereon; also there may be substantial changes in conditions of the surrounding property such as change of character of neighborhood, the economic growth of the area, whether business or residential, all of which would have a bearing upon the probative value of such testimony.

Consequently, the better rule seems to be to admit such evidence if in the sound discretion of the trial court the date of purchase is not so remote in time, and conditions with respect to the property have not changed so materially as to destroy the evidentiary value. This view is supported by respectable authority in other jurisdictions.

In Love vs U. S. decided by the Circuit Court of Appeals Fifth District, April 19, 1944, 141 Fed. 2d 981 at page 983, the court said:

> "The admission in evidence of the 1933 deed is objected to for the reason that it disclosed that the consideration paid for the land in 1933 was only $4,000.00 which appellants say is irrelevant to the

issue of market value because too remote in time. The objection fails for two reasons. First, the admissibility of the deed evidencing a purchase of the property seven years before the date of taking was a matter within the discretion of the trial judge. United States v. Becktold Co. 8 Cir. 129 F. 2d 473, 479 * * *."

In Orgel on Eminent Domain, Sec. 136 p. 581, the Love case among others is cited in a note as follows:

> "Where sales of the identical property are offered in evidence, the question generally involved is whether the time of the sale is so remote as to destroy the evidentiary value. The matter is largely in the discretion of the court and considerable latitude is observed in the decisions. Compare Thornton v. Birmingham, 250 Ala. 651, 35 So. 2d, 545, 7 A. L. R. 2d 773 (1948) citing Orgel (sale 2 years before taking); Love vs United States, 141 F. 2d 981 (1944) (sale 7 years before taking); St. Louis v. Paramount Shoe Mfg. Co. 237 Mo. App. 200 168 S. W. 2d, 149 (1943); see also United States vs A Certain Tract or Parcel of Land 47 F. Supp. 30 (S. D. Ga. 1942)."

We think that evidence of purchase price of the identical property is a matter within the sound discretion of the trial court with proper instructions to the effect that the only issue to be tried is the value of the property at the time of the taking and evidence admitted by the trial court as to the purchase price thereof may be considered only as one factor for whatever probative value it may have, *if any*, as bearing upon the value of the property at the time of the taking by eminent domain. We conclude, therefore, that the trial court did not abuse its discretion in the admission of this evidence and in failing to limit the same, and, therefore, assignments of error No. 3 and No. 4 are overruled.

Proceeding now to a consideration of assignment of error No. 5, to the effect that the court erred in admitting

evidence of a purported financial statement of Ellis, it is claimed that the court erred in three respects, namely (1), that there was no evidence to show that the statement was authorized by Ellis; (2) that the statement, if authorized, was for use only in a divorce suit for the purpose of a property settlement; (3) that the statements were illegally obtained and a violation of privileged communication between attorney and client.

It appears that on the financial statement in question, the cost prices of all the properties which Ellis owned were listed. Among many other properties listed was the property here subject to appropriation and the purchase price and market value thereof were shown by the evidence to be precisely the same. Counsel for the former Mrs. Ellis testified to the effect that when the statement was given to him, he was told that the figure under the column "market value" merely showed the cost or purchase price and that it was so considered by him. Counsel for Mrs. Ellis further testified that he could not say that the attorney who gave it to him (who was not one of record) represented, or was acting as agent for Ellis, in turning over the statement to him. Counsel for Ellis then called counsel for the Commission as a witness to testify as to where he procured the copy of the financial statement. He declined to answer on the ground of privilege in which declination he was sustained by the court and a motion to exclude the document was overruled. We find no evidence in the record showing that the statement was authorized by Ellis. It appears that the litigation incident to the divorce case between Ellis and his former wife, extended over a period of more than three years and terminated in a divorce in August, 1951, or a little over two years before this appropriation case was instituted in September, 1953. We find that the effect of this evidence was to interject, to his prejudice, the character and reputation of Ellis whereas this being an action in rem, the sole question was the reasonable market value of the land involved and the damage to the residue irrespective of the domestic troubles and financial worth of the owner.

The exhibit appears to be a complete financial statement which includes not only the subject property but other properties, both real and personal, showing an itemization of quick assets, cash, inventory of a business entitled, "Kahler Company" fixed assets, various properties located in Toledo, oil investments automobiles, 22 buildings described as "New Albany Houses" Ellistown Houses with assets totalling $1,170,682.03, which after deduction of liabilities, shows net assets of $481,895.92. There can be no doubt that the subject property was shown under "Market Value" at the price Ellis paid for it six years before these proceedings. This appears affirmatively both from the evidence and by the comment of the trial judge at page 416 of the record where he stated:

> "The difference is very clear. The fair implication is that he had nothing to do with market value on that."

Since the price that Ellis paid for the property six years before was already in evidence, having been testified to by Ellis under cross-examination, and since the financial statement was purportedly used in the divorce case to settle the marital difficulties and property disputes between Ellis and his wife, and since the exhibit contained a full financial statement of Ellis, including properties and cash position completely irrelevant to the issue here presented, we conclude that the admission of such an exhibit could have no effect other than to prejudice the jury against Ellis, having no probative value either as an admission against interest or otherwise. In our opinion the predominant character of the document was such as unquestionably to influence the thinking of the jury to the prejudice of Ellis.

It should be remembered that in appropriation cases there are no formal pleadings or definite issues which admit affirmation upon one side or denial upon the other, as to the value of the property taken. Hence the doctrine of "Burden of Proof" has no application. The jury

acts merely as an assessing or appraising board, determining the fair market value of the property from all the evidence submitted. See syllabi in Martin et al. v. City of Columbus, 101 O. S. 1. See also, Gas Transit v. Wolfe, 159 O. S. 391 at page 393. It is essentially a proceeding in rem. See: In re Appropriation: Sowers, Supt. v. Schaeffer, 155 O. S. 454. It should also be noted that an owner of property whether expert or not, is entitled to testify as to his opinion of the value of his property at the time of taking. See Morris v. Huber, 15 O. L. A. 71, Brates v. McDonald, 95 O. A. R. 448.

This being a proceeding in rem and not in personam, the divorce proceedings five years prior thereto, and his financial worth at that time, were completely irrelevant, by reason whereof the admission of such evidence was highly prejudicial and constituted reversible error. Therefore, we find that assignment of error No. 5 is well taken and should be sustained.

Proceeding to a consideration of assignment of error No. 6, to the effect that the court erred in permitting the witness, Schenck, to testify, it appears that the Commission called as a witness, Charles Schenck of Columbus, Ohio, to give his expert opinion as to values of property in Lucas County. The record shows that the witness had never bought or sold property in Lucas County. He had made one other appraisal in Toledo ten years previously but had no other experience with values in Toledo. The record shows that his opinion of values in Toledo and Maumee was not based on experience or actual knowledge but was formulated entirely by an inspection of public records and revenue stamps on deeds.

While there may be some doubt as to the qualification of the witness to testify concerning land values in Toledo, we cannot say that it was error to permit him to testify at all, as his experiences with the Turnpike Commission and as a real estate dealer may have qualified him generally as an expert witness. This was a question largely within the sound discretion of the trial court. But in our opinion it was prejudicial error to permit him to testify as to sales

and values of other properties based solely and exclusively upon information gleaned from examination of public records and revenue stamps on deeds. Such evidence has been held inadmissible by text writers generally and by authoritative decisions of courts of last resort. Specifically, see Schuck v. West Side Belt R. R. Co., 283 Pa. 152, syllabus 2, and Tiffany v. Delaware L. & W. R. R. Co., 262 Pa. 300, syllabus 1 thereof being as follows:

> "1. In eminent domain proceedings to assess damages to a tract of land caused by the condemnation of part thereof for railroad purposes, a witness who has had no direct knowledge of the sales of land in the neighborhood, cannot qualify himself to testify as to the market value of the land *by examining the public records of conveyances of land in the neighborhood, for the purpose of ascertaining the consideration named in the deeds.*" (Emphasis added.)

In Jahr on Eminent Domain, published in 1953, Sec. 133, p. 205, we find the following:

> "Whether the witness, be he expert or otherwise, is sufficiently familiar with the property to be entitled to express an opinion, is a question for the trial court or the trial commissioners. However, when the question is presented as to the witness, knowledge of sales, the courts generally are more exacting and require the expert witness to have personal knowledge. *Thus a witness will not be permitted to testify as to value where his sales are based exclusively upon information derived from a reading of a public record, revenue stamp inspections, stamps affixed to deeds that is, and the like.*" (Emphasis added).

Authorities cited in support of the text are as follows:

> "Denver v. Quick, 108 Colo. 111, 113 Pac. 2d, 999, 134 A. L. R. 1120; Tiffany v. Delaware L. & W. R. R., 262 Pa. 300, 302; 105 Atl. 101; Schuck v. West Side R. R. Co., 283 Pa. 152, 155; 128 Atl. 832; Essex Co.

Park Comm. v. Brokow, 107 N. J. Law 110, 112; 150 Atl. 387; Chi. & W. I. R. R. Co. v. Heidenreich, 254 Ill. 231; 98 N. E. 567. Annot. Cases 1913C, 266."

See also: Nichols on Eminent Domain, 3rd Ed. Vol. 5, Sec. 21.3, page 278 et seq.

It is held generally that this character of testimony is objectionable from many points of view, being mere hearsay, unreliable and inadequate proof of the competency of the witness. Furthermore, public documents speak for themselves and if their contents are admissible for any purpose, the best evidence rule requires their production in open court.

While there is some holding to the contrary, we are supported in our view by the greater weight of authority on this subject.

We proceed now to a consideration of assignment of error No. 7, to the effect that the court erred in permitting evidence of sales of other properties claimed to be similar to the subject property. Argument on this assignment of error is divided into three parts; (a) price determined by revenue stamps; (b) sales referred to were not comparable; (c) evidence of other sales was only admissible on cross-examination.

Considering first sub-head (a), it is complained that valuation witnesses for the Commission—Mayer, Rupert and Schenck—based their testimony on information gained from inspection of public records and from the revenue stamps on deeds.

We have discussed this subject under assignment of error No. 6 where we express the view that the valuation testimony of these witnesses for the Commission, in respect to sales of other properties claimed to be similar, was incompetent where predicated wholly and solely on inspection of revenue stamps on deeds and public records. This holding would not disqualify them, however, as valuation witnesses in respect to the subject property, if otherwise qualified, nor prevent them from testifying as to

prices paid for similar lands of which they had direct knowledge.

Under sub-head (b) it is claimed that there was no showing that the properties which were the subject of the sales inquired about, were in any way comparable to the subject property as to zoning, improvements, size, accessibility to major streets and roadways, availability of utilities, topography, etc.

An examination of the record discloses that some of the sales permitted under the general classification of sales of similar properties may have been remote. The record does not clearly show that such properties were so remote as to render such evidence incompetent. Some of the sales evidence included properties very close to the subject property, and being comparatively recent, were properly admitted in evidence.

The court permitted evidence of the sale of an eight-acre tract by county commissioners under sealed bids subject to a waiver of damages accruing from the construction of the Ohio Turnpike. We think this evidence was incompetent as it was in the nature of a public sale, with the property going to the highest bidder, subject to the conditions stated. Forced sales, or sales at public auction, are not competent evidence of sales of comparable or similar property because to be admissible at all, such sales must be voluntary, the test being the price which a willing seller who is not obliged to sell will accept from a a willing purchaser who is not obliged to purchase.

While evidence of sales so remote in time and so remote geographically as not to have a probative value on the issues of the value of the particular property sought to be taken should not be permitted, the trial judge must be allowed sound discretion in the admission of evidence of similar sales, being subject to reversal only where it is clear that there has been an abuse of discretion in admitting evidence so remote as to destroy the evidentiary value.

Under sub-head (c) it is the claim of appellant that the court permitted evidence of other sales on direct and redirect examination by the valuation witnesses testifying for the Commission, whereas it is claimed that such testimony under Ohio law can only be adduced on cross examination and it is claimed that the admission of such testimony on direct and redirect examination constitutes prejudicial error.

In examining the record, we find that in one instance a witness for the Commission—Mayer—testified on direct examination as to the sale of twenty-five acres on Byrne Road, the record showing that the witness based his testimony on tax stamps affixed to the deed. We have previously ruled that such testimony predicated solely upon examination of tax stamps is inadmissible.

In another instance, the same witness testified to a sale of twenty acres immediately adjacent to the Ellis property, sold by First Toledo Corporation to the City of Toledo for $19,989.00. Upon objection by appellant and after argument in absence of the jury, the question was withdrawn. There was no request to instruct the jury to disregard the question and answer, and none was given. Inasmuch as the testimony given by this witness as to sale price of the property in question was precisely the same as that given by the appellee concerning the same property, no prejudice resulted.

Another witness for the Commission—Ruppert—testified on direct examination as to his knowledge concerning various other sales but did not at the same time testify as to the sale prices thereof so that no prejudice resulted from his direct testimony. Under these circumstances, we are not here presented with the question of the admissibility under Ohio law of sales prices of other comparable properties elicited on direct examination. However, we do have the question of admissibility of such evidence or redirect examination.

Counsel for both parties concede that there is a division of authority on the question of admissibility of sales prices

on direct testimony of valuation witnesses and agree that the question has never been directly passed upon by the Supreme Court.

In DeRose v. Cleveland, 14 O. L. A. 176, a case arising in this district, it was held as appears in the second and third paragraphs of the syllabus:

> "2. A witness called to testify as to the value of real estate in an appropriation proceeding, may, after being qualified as an expert, state in his direct examination in chief that he is acquainted with the values of real estate in the vicinity of the property in litigation and that he knows the sale price of specific parcels, or tracts of similar quality and location, but cannot testify in chief what those sales prices were. See 15 O. Jur. Eminent Domain, 199.
>
> 3. On cross-examination a witness qualified as an expert in the value of real estate may testify as to the sale price of property similar to that which is sought to be taken in an eminent domain proceeding, if it is first made to appear that the other property is similarly situated, that the sale was made in an open and fair market, sufficiently near in point of time and that other circumstances relative to value are similar."

In the later case of Muccino v. B. & O. Rd. Co., 33 O. App. 102, Washburn, J. at page 105, states:

> "As to whether evidence of sales of similarly situated property in the vicinity is admissible on direct examination, there is a conflict in the authorities; one line of decisions called the 'Massachusetts Doctrine' favors the admissibility of such evidence and the other known as the 'New York Doctrine' rejects such evidence."

Since the decision in that case, New York has, by statute, changed the rule so that it may be stated that in the New York as well as in the majority of jurisdictions, the sale price of similar property is now admissible on direct ex-

amination and not limited to cross-examination. It is stated in a note in 5 Nichols on Eminent Domain, page 278, as follows:

> "In New York in the ascertainment of just compensation, the old rule which did not permit evidence of sales on direct examination has been changed by statute and evidence of sales prices is now admitted on direct examination, and not limited to cross or redirect examination, and undue delay and surprise in the trial is now avoided."

In Village of Lawrence v. Greenwood, 300 N. Y. 231 at page 236, 90 N. E. 2d, 53, the court said:

> "The objection interposed by appellants on the hearing and now urged upon this appeal, is that expert witnesses called for the purpose of proving value may not testify on direct examination as to sale prices of other comparable property in the neighborhood because we are told such evidence presents collateral issues involving a variety of considerations. We are mindful that such was the rule—and such was the reason given for that rule—in Robinson v. New York Elev. R. R. Co., 175 N. Y. 219, 222 (citing other cases) * * *. We no longer adhere to the rule which was decisive in the Robinson case supra * * *."

We think that Ohio should eventually be in accord with the majority of the States which adopt the so-called Massachusetts Rule. We discuss this problem only because we are confronted with the question here of the competency of testimony as to sales of similar properties on redirect examination. Undoubtedly, witnesses who are cross-examined as to sale prices of comparable properties may be examined on redirect in respect of such properties. In the instant case, however, on redirect examination, testimony was given showing prices of properties not inquired into or testified to on cross-examination.

Upon due consideration we have reached the conclusion that no error, prejudicial to the rights of the appellant,

resulted from such redirect examination. See Lorain St. Ry. Co. v. Sinning, 17 O. C. C. Rep. 649.

Proceeding now to a consideration of assignment of error No. 8. The assignment of error relates to a special charge No. 2 wherein the jury was instructed concerning the weight to be given to testimony of witnesses. While there may be some doubt as to the correctness of a charge instructing the jury to view with caution the testimony of witnesses having an interest in the cause, we find that counsel for appellant withdrew his objection to the charge when a change was made therein, as suggested by him, so that the issue raised by assignment of error No. 8 is not before us for determination.

Assignment of error No. 9 relates to a claimed error in the court's instruction on billboard, sign rights and abutter's rights. On this question the resolution of the Turnpike Commission contained a provision appropriating all rights to erect on any of the remaining lands of the owner billboard sign notices or posters and the court so charged.

At the time of the trial the Supreme Court had before it on appeal the case of Ellis v. Turnpike Commission, but since then has rendered a decision in favor of Ellis, holding that the Commission was without authority to acquire the billboard rights of the owner in the remaining lands, by reason whereof the appellant lost nothing by the charge complained of, the question now being moot. See Ellis v. Turnpike Commission, 162 O. S. 86. Consequently, the claimed error in this respect cannot now be sustained. As to the question of abutters' rights, other than billboard rights, the record shows that the court charged that compensation to which the owner is entitled included the fair value of all abutters' rights.

We proceed now to a consideration of assignment of error No. 10, to the effect that the verdict of the jury was contrary to the manifest weight of the evidence. The jury awarded $12,265.00 for the land actually taken, or approximately $1,500.00 an acre. There were 8-1/10 acres

in parcel 51-G, and 51-G-1 taken by the Commission. It is contended by appellant that for property in this vicinity and of the size taken, the verdict was a ridiculously low figure. It is claimed also that the natural advantages of the property in view of its location and accessibility to other parts of Lucas County; its size; topography; the neighborhood in which it is situated, are such as to require a much higher valuation for the land taken and for the damages to the residue.

The record shows as contended by plaintiff, that three of the Commission's expert witnesses, Rupert, Mayer and Schenck, placed a higher valuation on the land taken than that allowed by the jury, the witness, Schenck, placing a valuation of $16,170.00 on the land as against the award of the jury in the sum of $12,265.00.

It should be noted, however, that other witnesses for the Commission placed a valuation lower than that allowed by the jury and there is a variation in the appraisals allowed for the damage to the residue. The record also shows that the valuation testimony adduced by the appellant placed a very much higher value on the land taken, as well as damage to the residue, so that there was a wide variation between the valuations of the expert witnesses testifying for the respective parties.

In view of this evidence, the three judges are unable to agree that the verdict of the jury was manifestly against the weight of the evidence.

We proceed now to a consideration of Assignment of Error No. 11, in which it is claimed that the court erred in refusing to grant a motion for new trial because of the misconduct of a juror. It appears that during the trial of the case and after some of the evidence had been received, but long before arguments of counsel or the charge of the court, a juror discussed the case with two persons, both strangers to the lawsuit, at the plant where all three were employed. To one of these employees he said, in reference to the case,

> *"it is just a matter for the jury to decide how much was paid for the property to begin with, and whether or not Mr. Ellis was trying to profiteer."* (Emphasis added.)

Undoubtedly the juror was guilty of misconduct in discussing the case in violation of the court's instructions. His statement also shows a complete misconception of the applicable law and a prejudicial attitude toward Ellis. The fact that this juror was later elected foreman of the jury magnifies the possibility of baneful influence upon the jury which may have been a contributing factor in arriving at a verdict. In any event, it raises a serious doubt as to the juror's impartiality and possibly the impartiality of the other jurors in their consideration of the case. There is no denial of the misconduct of the juror, and no evidence to show whether it did or did not influence the other members of the panel.

The parties have cited many cases in support of their respective contentions but we have found no cases directly in point.

In the case of Peart v. Jones, 159 O. S. 137, Middleton J. speaking for a unanimous court, said at page 140:

> "The basic and underlying principle of the right of trial by jury is that such trial shall be heard and determined by a jury of persons completely unbiased and uninfluenced by extrinsic considerations. It is universal practice in American courts to surround juries with safeguards to insulate them from influence of every kind. Any extraneous contact with a jury or any member thereof which would tend to influence the verdict in the slightest degree has been universally condemned."

Paragraph 3 of the syllabus of that case, reads:

> "3. Where a juror during the trial of the case in which he is so serving, is offered any valuable thing

> to influence him with respect to the discharge of his duty as such juror and such offer is not reported to the trial judge until after the verdict is rendered and the jury discharged, a motion for new trial must be granted."

We must, however, distinguish the Peart case from the instant case on the facts, because there is no evidence here that any of the appellee's agents had approached the juror and there is no evidence that his fellow-employees engaged the juror in a conversation designed to have a tendency to influence the conclusion of the juror.

We have reached the conclusion, however, that this incident of misconduct of the jury foreman, when considered together with the other errors of a prejudicial nature discussed herein, such as the admission of evidence prejudicial to the rights of appellant, and the rejection of evidence to which appellant was clearly entitled, all prevented the appellant from having a fair trial and requires that a new trial be granted.

It is our conclusion, therefore, that the judgment be reversed and the cause remanded for further proceedings according to law. A journal entry may be drawn accordingly. Exceptions noted.

Kovachy J. concurs.

Skeel J. dissents. (See dissenting opinion.)

DISSENTING OPINION

IN THE COURT OF APPEALS OF OHIO
LUCAS COUNTY, SIXTH DISTRICT

In the Matter of Appropriation by Ohio Turnpike Commission of the property of Cooley Ellis.	No. 4777

DISSENTING OPINION

February 17, 1955

(Hurd P. J., Kovachy J., Skeel J. of Eighth District sitting by designation in the Sixth District.)

Appearances: For Plaintiff Appellant: Taylor, Cruey & Kelb; for Defendant Appellees: Frank C. Dunbar, Jr., General Counsel, Fuller, Harrington, Seney & Henry.

Skeel J. (Dissenting).

This appeal, on questions of law, deals, as has been stated by the majority opinion, with the value of the land of Ellis (designated in the proceedings as the Seventh Avenue tract) taken as part of the right of way for the Ohio Turnpike by the Ohio Turnpike Commission. The tract, in its entirety, consists of about fifty acres situated on the northwesterly side of the intersection of Detroit Avenue and the Anthony Wayne Trail. The Turnpike is taking approximately eight acres of the fifty-acre tract, running diagonally through the easterly, or perhaps more correctly described as the southeasterly end of the property with an extension of Devonshire Road which now dead ends on the northeast side of the Ellis property, through the Ellis property to meet Crystal Road on the west.

The result of the Turnpike development leaves the Ellis Seventh Avenue property with 4½ acres of land facing on Seventh Avenue, zoned for commercial use, with Seventh

Avenue coming to a dead end at the Turnpike, where before it extended through to Detroit Road. The remaining property between the Turnpike and the 4½ acre tract zoned for commercial purposes, is a triangular tract of 4¾ acres zoned for multiple family dwelling. To the north of the Turnpike running to the extension of Devonshire Road is a triangular piece of land consisting of a little less than three acres and the balance of the tract contains about 30 acres to the northwest of the said extension which is now zoned for multiple family dwellings. The southwesterly line of the property is the southwesterly line of the City of Toledo, except for a very small part at the southwesterly corner which is in the Village of Maumee.

The aerial views introduced in the record show the development around the property, both in Toledo and to the northeast, and in Lucas county to the southeast, and to the north, to be alloted and sparsely occupied with small suburban homes and a considerable expanse of farm land with a shopping center at the corner of Detroit Road and the Anthony Wayne Trail, and an occasional multiple family dwelling.

The property was purchased by Ellis in 1948 for $20,000.00, or at the rate of about $400.00 an acre. The verdict of the jury as compensation for the eight acres taken was $12,265.00 or about $1533.00 an acre, and damage to the residue of $32,081.50 or about $750.00 an acre, leaving Ellis with 42 acres of land and a judgment for $44,346.00 or about $9,000.00 more than the average of the value and damage testified to by the Commission's expert witnesses.

This last fact is mentioned only because the defendant argues at length on the alleged fact that the verdict of the jury was less than that given as the opinion of damage by Turnpike Commission experts.

The majority opinion overrules all of plaintiff's assignments of errors except Nos. 2, 5 and 6. As to assignment of error No. 11 dealing with the conduct of a juror, it is stated that when considered with the other errors held prejudicial to the rights of Ellis it must be included as one of the grounds for reversal.

I am in full agreement with the reasons for overruling assignments of error Nos. 1, 3, 4 and 7 to 10 inclusive, as stated by the majority opinion. As to assignment of error No. 11, the circumstances being one not induced by either party and there being no showing of prejudice to Ellis because of the juror's statement, it should be overruled.

Error No. 2 is sustained by the majority opinion because of the rejection of Exhibits Nos. 12 to 15 inclusive, said exhibits being plans of some 600 multiple family dwelling units which Ellis testified he was considering as an improvement for that part of the Seventh Avenue property zoned for mutiple family use.

There is no dispute but that the court did admit into evidence Exhibit No. 11, which was the plan of street layout and building lines for the proposed apartments. The only thing excluded was the floor and elevation plans and specifications. There is no dispute in the evidence but that a property like the Seventh Avenue property of Ellis could be adapted and was suitable for commercial use in part and in part for multiple family dwellings. The witnesses for the Commission and for Ellis were given full opportunity to give their opinions as to its availability for such uses and its value when considered for such purposes, together with all other purposes to which it might be reasonably adapted.

The elevation and floor plans for a project that was drawn up but progressed no further for a period of five years before the taking, could add little for the jury's consideration of the present value of the property, except, perhaps, that the proposed development was at least a little ahead of the then needs of the community. The question for the jury to decide was the value of the property taken and the damage to the residue when considered in the light of all uses for which it might be suitable, including the most valuable use to which, under all the surrounding circumstances, it was reasonably adapted at the time of the taking. Sowers, Supt. v. Schaeffer, 155 O. S. 454.

The expert witnesses for both sides testified fully as to their opinions of the value of the land taken and damage

to the residue when considered for the best use for which they considered it was then reasonably available, there being some dispute only as to what such uses might be.

It was claimed by Ellis that the purpose for offering the plans was so that "the appraisers, the ones who will value the property, will be able to say they inspected the plans when they put a value on it. That is all we are asking."

If this be the purpose for which the exhibits were offered, the court was clearly right in rejecting such evidence as attempting to fix a value for a specific use independent of all other uses for which the property is suitable.

Ellis, under this assignment of error, relies upon Cincinnati & Springfield Ry. Co. vs Longworth, 30 O. S. 108. The facts of the Longworth case are clearly distinguishable. There, while the plat of a subdivision through which plaintiff was condemning a right of way, had not been recorded, yet several lots had been sold according to the plat before the appropriation proceedings had been filed. Here, the exhibits attempted to spell out proposed buildings that may never be built. Their admission into evidence could be effective only in fixing a proposed single special specific use to which the property might be devoted. And in this connection, it must be remembered that the proposed street layout and building lines as exemplified by Exhibit 11 and upon which the buildings, as shown by the tendered exhibits, were to be built, was received into evidence thus fully complying with the rule of the Longworth case. The court did not commit error in excluding Exhibits 12 to 15 inclusive.

Error No. 5 is concerned with a financial statement claimed to have been created or authorized by Ellis in which he set forth, together with his other assets and liabilities, the cost of the Seventh Avenue property and his estimate of its value (which on this exhibit was the same as the cost) it being claimed that the exhibit was created in the summer of 1951. The evidence supports the claim that the exhibit was created to be exhibited to the attorney for Ellis' wife as a basis for negotiating a property set-

tlement between Ellis and his wife in a divorce case. The claim that the exhibit was a privileged communication is not, therefore, supported by the evidence. It was meant to be exhibited to the attorney for Ellis' wife and a copy of it was produced from his files. The dispute as to its authenticity, that is that it was created by Ellis or at his direction, was a jury question.

The purpose of presenting the exhibit was two-fold. First, as a declaration against interest, and second, as it might affect the credibility of Ellis as a witness when testifying to the value of his property taken for turnpike purposes. The property has but one value, and if in fact Ellis attempted to claim a value for one purpose and a wholly different value of other purposes, it certainly was admissible under the circumstances of this case.

Error No. 6 is concerned with the qualifications of "Schenck" one of the expert witnesses for the Commission, to testify as an expert witness. Said assignment of error, together with assignment of error No. 7 also deals with the manner in which the consideration received in sales of comparable property within a reasonable time prior to the taking of a part of Ellis' property for turnpike purposes was obtained by this expert witness.

The record discloses that the witness had had many years experience in the field of real estate appraisals but had never before made a study of Toledo real estate values.

The jury was fully informed as to the witness' background. His ability to be helpful in seeking out the value of the Ellis property taken and the damage to the residue was for the consideration of the jury. The objection presented in error No. 6 goes to the weight to be given to the testimony of the witness rather than its admissibility particularly where the court has a wide discretion in admitting opinion evidence.

While there is some authority which seems to reject the right of an expert witness in making a study of real estate values to examine the record of deeds in sales transactions of comparable property and to ascertain the consideration

paid for the property from Federal Revenue stamps attached to the deed, yet there seems no justification for such a rule. What more accurate information could thus be given as to the consideration for such transaction? In any event, whether the witness' testimony is credible, is a jury question and the court is without authority to take the place of the jury and reject the witness' opinion evidence under the circumstances here presented. Error No. 6 is not well taken.

This case is one in which the sole issue is the value of the Ellis property taken for turnpike purposes, and the damage to the residue because of such taking.

There is no question but that the jury's verdict is supported by credible evidence,—evidence to which Ellis could not take a valid objection and which was as legally admissible as that which he himself presented. The difference between the values claimed for the property involved; the part taken, and the damage to the residue by the contending parties, is so far apart that the jury could find no middle ground but was in a position where in its best judgment the evidence of one side or the other would have to be the basis for its verdict.

The appraiser, Jack Haley, called by Mr. Ellis, appraised the 4½ acres zoned for commercial purposes fronting on Seventh Avenue at $97,700.00, that is about $22,000.00 an acre, and the remaining land zoned for multiple family dwellings at $444,600.00, or at a rate of about $10,000.00 an acre (in this last tract there was about 1/10 of an acre in the commercial zone) making a total value for the 50-acre tract of $542,300.00. The other two witnesses for Ellis are in substantial agreement with these figures and Ellis also accepted them as his opinion of the value of his land.

The Commission's witnesses put a total value on the 50-acre tract of from $75,000.00 to $90,000.00, that is about $4000.00 an acre for the commercially zoned 4½ acre tract and $1500.00 an acre for the remaining 45½ acres. The Commission's appraisers are in a measure, supported by actual sales transactions in the neighborhood and else-

where in Toledo. Ellis purchased a 46-acre tract diagonally across Detroit Road, known as Storer Field, three years before the trial, for $870.00 an acre. It was then zoned in part for residence purposes but no difficulty was experienced in changing the zoning to whatever classification the owner desired, as is shown by the record.

The Town & Country Shopping Center directly across the highway from the Seventh Avenue property was purchased in two parcels, one being 4.7 acres for $4808.00 an acre, and 8.8 acres adjacent to it for about $6000.00 an acre.

The foregoing sales were in 1952, or less than one year from the date of this trial. Other sales between 1950 and 1953 of property zoned for residence use and multiple family dwellings and apartments in the Toledo area, developed that the highest price paid for acreage of this type was about $2000.00. While sales as such, are not conclusive in fixing value because there are never two properties exactly alike, yet they are in fact a guide which an appraiser considers in determining what a willing seller would take when under no compulsion to sell, and a willing buyer not under the necessity of buying, would pay, or in other words, the appraiser's judgment as to the true market value of the subject property.

The verdict of the jury shows they gave greater credence to the evidence of the expert witnesses for the Commission than to those presented by Ellis. This was a matter entirely within their province. The verdict also shows that if there was error in withholding elevation and floor plans of the proposed 600 multiple dwellings or in submitting the financial statement of Ellis or the evidence of Schenck, such error in no way influenced the verdict.

Section 2309.59 R. C., provides in part that where it is disclosed upon the record that substantial justice has been done the party complaining, an appellate court shall not reverse a judgment because some error may have intervened. This section is applicable here.

The judgment of the trial court should be affirmed.

DECISION OF THE SUPREME COURT

Ohio Turnpike Commission, Appellant, *v.* Ellis, Appellee, et al. (Two cases.)

Appropriation of property—Controlling question on appeal—Evidence as to value of land—Admission and exclusion of, discretionary with court—Discretion not interfered with by reviewing court, when—Valuation placed by owner on land appropriated—Admissible as declaration against interest, when—Testimony of qualified witness—Not inadmissible because sale price of nearby properties considered— Evidence of price of nearby property sold under sealed bids—Evidence of price paid by owner—Qualification of witness as expert rests with trial court—Ruling not reversed on appeal unless discretion abused—Misconduct of juror in making improper remarks—Not ground for new trial, when —Incorrect remark by counsel in opening statement—Not ground for mistrial, when.

1. On appeal from the final judgment in a proceeding to appropriate private property for public use, the controlling question for determination is whether the landowner, in a fair trial, received just compensation for his property actually taken and whether the damages to his remaining adjacent land were fairly assessed.

2. In such a proceeding, the admission and exclusion of evidence as to the value of the land and other related subjects rest to a large extent in the discretion of the trial court, and, where it is apparent that such court did not abuse its discretion in these respects and that no prejudicial error has intervened, a reviewing court will not interfere.

3. The valuation, which a landowner places on his property sought to be appropriated, set out in a nonprivileged written communication submitted to his wife's at-

torney as an incident to a divorce action and which is made a relatively short time before the commencement of the appropriation proceeding is admissible in evidence as a declaration or admission against interest and as bearing on the weight and credibility to be accorded his claim of a much higher valuation at the time of the proceeding.

4. In an appropriation proceeding, the testimony of a qualified witness, who has made a careful examination and investigation as to the value of the land, is not rendered inadmissible because, in reaching his conclusion as to value, he took into account as one factor the amount for which comparable nearby properties were sold, as indicated by the federal revenue stamps attached to the deeds.

5. In an appropriation proceeding, it is not reversible error to admit in evidence, as bearing on the question of the value of the land, the price at which a Board of County Commissioners, not required to sell, sold comparable nearby land under sealed bids, pursuant to an advertisement as prescribed by law, where the right to reject any and all bids submitted was reserved and where such sale was recently consummated.

6. The refusal of the trial court to grant a new trial for claimed misconduct of a juror in making improper and indiscreet remarks during the progress of the trial will not be disturbed, where such remarks were not induced by either party or his counsel and where it is not apparent that the juror's indiscretion influenced the unanimous verdict returned.

7. An incorrect and erroneous remark made by one of counsel in his opening statement to the jury, to which no objection was made at the time and which probably had little or no effect on the minds of the jurors, will not ordinarily form the basis at a later date for a motion asking the court to declare a mistrial for the misconduct of counsel.

8. The qualification or competency of a witness to testify as an expert or to give his opinion on a particular sub-

ject rests with the trial court, and, on appeal, its rulings with respect to such matters will ordinarily not be reversed unless there is a clear showing that the court abused its discretion.

9. In an appropriation proceeding, evidence as to the price paid by the owner for the property is admissible as bearing on its value at the time of the proceeding, provided the purchase was not made so long before the appropriation proceeding as to afford no fair measure of present value.

(Nos. 34430 and 34431—Decided December 28, 1955.)

APPEALS FROM THE COURT OF APPEALS FOR LUCAS COUNTY.

Both causes Nos. 34430 and 34431 are appropriation proceedings instituted under Section 1208, General Code (Section 5537.06, Revised Code), in the Court of Common Pleas of Lucas County by the Ohio Turnpike Commission to acquire for turnpike construction certain lands belonging to Cooley Ellis.

The land appropriated in cause No. 34430 consists of a right of way of 8.01 acres through a 50-acre tract of unimproved vacant land known as the "Seventh Avenue property" located on the northwesterly side of the intersection of Detroit Avenue and the Anthony Wayne Trail and within the limits of the city of Toledo.

Ellis purchased this 50-acre tract in 1948 for the sum of $20,000, or at $400 per acre. In this appropriation proceeding, the jury awarded Ellis the sum of $12,265, or about $1,533 an acre, for the 8.01 acres actually taken and awarded him as damages to the residue, approximately 42 acres, $32,081.50, which is at the rate of about $764 per acre; the total award being $44,346.50.

The land appropriated in cause No. 34431 consists of a right of way of 8.87 acres through a tract of about 45

acres known as "Storer Field," which, at the time this cause was tried in the Court of Common Pleas, was unimproved, there being no buildings or structures thereon. This 45-acre tract is situated at the southeasterly side of the intersection of Detroit Avenue and the Anthony Wayne Trail and within the limits of the city of Maumee. During the late 1940's Ellis purchased the entire 45 acres for $35,500, or for about $790 per acre.

In this appropriation proceeding the jury awarded Ellis $40,000 compensation for the 8.87 acres actually taken, or a little more than $4,500 per acre, and awarded him as damages to the residue, 36.13 acres, $56,825, or a little over $1,568 per acre; the grand total of the allowances being $96,825.

The figures arrived at by the respective juries in the appropriation proceedings were lower than the valuations testified to by expert witnesses produced by Ellis and were higher than the valuations testified to by expert witnesses produced by the commission.

In both causes the Court of Common Pleas entered judgments on the verdicts returned and later overruled Ellis' motions for new trial.

Appeals on questions of law were perfected by Ellis in both causes to the Court of Appeals for Lucas County, the judges of the Eighth District Court of Appeals sitting by designation in place of the regular judges of the Sixth District Court of Appeals, where the judgments below were reversed, one judge dissenting, for errors of law occurring in the trials which were found prejudicial to the rights of Ellis.

Both causes are now in this court for disposition on their merits, pursuant to the allowance of motions made by the commission to require the Court of Appeals to certify its records.

Mr. Frank C. Dunbar, Jr., and *Messrs. Fuller, Harrington, Seney & Henry*, for appellant.

Messrs. Winter & Frank, for appellee.

Zimmerman, J. The power of eminent domain is the power of the nation or a sovereign state to take, or to authorize the taking, of private property for a public use without the owner's consent, conditioned upon the payment to the owner of just compensation. By Section 1208, General Code (Section 5537.06, Revised Code), the General Assembly has authorized and empowered the Ohio Turnpike Commission to appropriate private property for turnpike construction, upon the terms therein prescribed.

The controlling question in both the appropriation proceedings now under consideration is whether Ellis did, in fair trials, receive just compensation for his lands actually taken and whether the damages to his remaining adjacent lands were fairly assessed.

On his appeal to the Court of Appeals in cause No. 34430, Ellis, in his assignment of errors, claimed the commission of 11 errors by the trial court. Out of this number a majority of the Court of Appeals found five which, in its opinion, were prejudicial to Ellis and upon such basis reversed the judgment below and remanded the cause for a new trial. These five errors were as follows:

1. Error in excluding from the evidence the prepared plans and specifications for apartment houses proposed to be built on the land affected, and the fact that an application for Federal Housing Administration financing to consummate such purpose had been made.

2. Error in admitting a financial statement which it was claimed Ellis had prepared and submitted in 1951 in connection with a divorce action then pending between him and his wife, and in which statement Ellis had placed a valuation on the lands in controversy considerably lower than the amount claimed in the appropriation proceeding.

3. Error in permitting Charles G. Schenck, an expert witness for the commission, to testify as to the value of the land in controversy, where, as a part of his investigation and by reference to the revenue stamps attached to recorded deeds, he had obtained information as to the prices for which comparable properties had been sold.

4. Error in admitting in evidence the price at which the commissioners of Lucas County had sold under sealed bids an eight-acre tract of land in proximity to the Ellis land in controversy.

5. Error in refusing to grant a new trial for the misconduct of a juror.

As to the first error noted, the construction of the apartment buildings was but a contemplated project which might never have materialized, and, although the admission of the plans and specifications in evidence would not be subject to serious objection, their exclusion did not constitute reversible error, particularly in view of the fact that, in testifying as to the most valuable uses to which the Ellis land might be put, the witnesses fully described its availability and adaptability for multiple dwellings and commercial buildings and gave their opinions as to the value of the land, based upon such uses as well as other similar uses.

Also, the court in its general charge told the jury that in its determination of the value of the land appropriated it should take into account its worth for any and all uses to which it might be suitable, including the most valuable uses to which it could reasonably and practically be devoted. Such instruction was in line with what was said by this court in the case of *In re Appropriation by Supt. of Public Works*, 155 Ohio St., 454, 99 N. E. (2d), 313.

As to the second error noted, in 1951, a divorce action was pending between Ellis and his then wife. In connection with this litigation, counsel for Mrs. Ellis requested a statement showing what property Ellis owned and its value. Such a statement, detailing assets and liabilities, was furnished by one of Ellis' attorneys, who occupied the same office with him. Ellis was obviously aware of such statement, its contents and its purpose, because he admitted having discussed the subject with Mrs. Ellis' attorney.

On the trial, the attorney who had represented Mrs. Ellis in the divorce case was called as a witness by the commission and was questioned about the statement. It was produced by him and was offered and received in evidence as

an exhibit. Such statement set forth the appropriated land in issue with a valuation which was a good deal lower than that claimed by Ellis in the appropriation proceeding.

It would seem apparent that such a financial statement may not be regarded as a privileged communication, the general rule being that communications made to one's attorney with the knowledge and understanding that they are to be conveyed by him to others are stripped of the idea of a confidential disclosure and are therefore not privileged.

We are further of the opinion that such financial statement, made within a comparatively short time before the appropriation proceeding was begun, was properly admitted in evidence as constituting a declaration or admission against interest as to Ellis and as bearing on the weight and credibility to be accorded his claim as to the value of his land at the time of the appropriation.

As to the third error listed, Charles G. Schenck of Columbus, Ohio, was called as a witness by the commission. He qualified himself as an expert of long and extensive experience in appraising and evaluating all kinds of real property in different parts of Ohio. He testified that he spent seven full days in making a thorough investigation and study of the Ellis land, including inquiries of those familiar with real estate values in Lucas County and an inspection of the Ellis land. According to his testimony he took into account every pertinent factor bearing upon value which embraced the highest and best practical uses to which the property might be put. True, Schenck did note the revenue stamps on deeds conveying adjoining and nearby properties to ascertain the prices for which they had been sold, but from the examination of his entire testimony it is clear that this was but a single factor in the reaching of his opinion as to the value of Ellis' appropriated lands.

In *Ramming Real Estate Co. v. United States* (C. C. A. 8), 122 F. (2d), 892, 895, an appropriation proceeding brought by the United States, the court had the following to say concerning the testimony of a witness who expressed his opinion as to the value of the land there appropriated:

"* * * He also took into consideration the revenue stamps which were affixed to the deeds. These were attached pursuant to federal statute, the violation of which is made a crime. With this sanction, we think the amount of revenue stamps attached to the deeds may be said to have been a reliable source of information as to the amount of the consideration paid for the property described therein. Here, again, the argument is one that may have been addressed to the jury as affecting the weight of the testimony, rather than going to its admissibility. We think there was no abuse of discretion in admitting this testimony which the witness said he had taken into consideration in arriving at the fair market value of the property in controversy."

There was much testimony of a conflicting nature as to the value of Ellis' appropriated lands. Naturally the trial judge has a good deal of discretion in admitting or excluding evidence of this kind, and, where such discretion has not been patently abused, a reviewing court should be slow to interfere. Generally, testimony as to the value of appropriated lands, the qualifications of the witnesses who testify as to value, the means whereby they arrived at the figures given, and their sources of information go to the weight of the testimony rather than to its admissibility.

A thorough examination of the bill of exceptions convinces us that the trial court did not commit reversible error in its admission and exclusion of the evidence discussed above and relating to the value of Ellis' land. The jury was presented with a wide variety of evidence touching value, and it was its province to weigh such evidence, to estimate the qualifications and the credibility of the witnesses and to arrive at such value as it considered fair and proper.

As to the fourth error noted, relating to the admission in evidence of the price at which the commissioners of Lucas County had sold under sealed bids eight acres of land comparable to the Ellis land, we see nothing particularly pernicious about receiving such evidence. A majority of the Court of Appeals seems to have taken the position that such sale by the county commissioners was equivalent to a forced sale or a sale at public auction and that such evi-

dence was therefore inadmissible. It appears that the Board of County Commissioners, which held title to the eight acres and wished to sell the same, requested sealed bids in a notice published for four consecutive weeks and which contained the reservation of the right "to reject any and all bids for the purchase of such real estate."

This was hardly a "forced sale" because as we understand that term it means a sale which the vendor *must* make immediately without the time or opportunity to find a buyer who will pay a price representing a sum approaching the reasonable worth of the land sold.

And according to the statement in 31 Corpus Juris Secundum, 886, Evidence, Section 182, the price obtained at a voluntary auction of land is ordinarily admissible in evidence as having a bearing on the true value of the land.

We are of the opinion that, had the trial court rejected the evidence as to the price at which the county commissioners sold the eight acres in question, no error would have been committed, but on the other hand it is our view that the admission of such evidence did not constitute reversible error.

We now come to error No. 5, which is concerned with the refusal of the trial court to order a new trial for the misconduct of a juror. In attempting to secure a new trial, Ellis produced two witnesses, fellow employees of one of the jurors in a manufacturing plant. In response to inquiries made by them the juror said to one, according to the witnesses' testimony: "What we are now on is the Ellis case. * * * It's just a man that owns some property out there where Detroit crosses the trail. * * * His appraisers—has appraised it. * * * The Turnpike Commission doesn't think it's worth that much."

To the other fellow employee, the juror is alleged to have remarked, among other things: "It was just a matter for the jury to decide how much was paid for the property to begin with, and whether or not Mr. Ellis was trying to profiteer."

Of course, the latter remark attributed to the juror was highly improper and indiscreet but was it so serious and of such gravity as to require the granting of a new trial?

In considering this matter four propositions are to be borne in mind.

1. No agent, attorney or representative of the commission induced the juror's statements or had any knowledge of them.

2. No opinion was expressed by the juror as to the merits of the case or as to how he would vote in the deliberations of the jury.

3. The verdict was signed by all 12 jurors.

4. There was no showing that the statement attributed to the juror was communicated to any other juror, that such remark influenced the verdict of the jury, or that the juror did not follow the instructions of the court in considering the case.

In a situation of this kind, much must be left to the sound discretion of the trial court, and where no deliberate abuse of discretion is plainly indicated the trial court's disposition of the matter should stand.

Appropriate here are the following remarks contained in the opinion in the case of *Armleder v. Lieberman*, 33 Ohio St., 77, 83, 31 Am. Rep., 530:

"To arrest from a party a verdict, which appears to have been honestly obtained, after long and expensive litigation, merely because a juror has been so indiscreet as to speak of the case to a stranger, when he could have received no advantage from that improper act of the juror, and the opposite party no prejudice, would be scarcely compatible with the due administration of judicial justice. When, however, the prevailing party, or his agent or friend, has approached a juror during the trial, or while he has the case under consideration, and addressed the juror on the subject of the action, the verdict should be

set aside. He should be made, in that way, to feel the punishment of violated law."

Compare *Steiner v. Custer*, 137 Ohio St., 448, 31 N. E. (2d), 855, and *Pearson v. Gardner Cartage Co., Inc.*, 148 Ohio St. 425, 446 *et seq.*, 76 N. E. (2d), 67, 76.

We think the majority of the Court of Appeals was wrong in reaching the conclusion that Ellis was entitled to a new trial because of the misconduct of a juror.

We now come to a consideration of cause No. 34431, which in many of its aspects is quite similar to cause No. 34430. Common to both is the refusal of the trial court to admit in evidence plans and specifications for structures which were merely in prospect and might never materialize; the admission in evidence of Ellis' financial statement, including the valuation of the land in controversy, which was prepared and submitted to counsel for Mrs. Ellis during the pendency of a divorce action between the Ellises; the admission of the testimony of an expert on real estate values, who, in estimating the values of the Ellis lands appropriated, took into account as one factor the sale price of adjacent lands as indicated by revenue stamps attached to deeds; and the admission in evidence of the amount received by the county commissioners for comparable land, the sale being effectuated by resort to the method of sealed bids. Since these questions have been discussed and passed on in our consideration of cause No. 34430, we shall say no more about them.

Three new questions are peculiar to cause No. 34431. They relate to the exclusion and limitation of testimony and to the alleged misconduct of one of counsel for the commission in his opening statement to the jury.

Was it reversible error for the trial court to refuse to allow Kenneth C. Welch of Grand Rapids, Michigan, a witness called by Ellis and who is an architect, city planner and a consultant primarily on commercial areas, to testify as to his estimate of the value of Ellis' appropriated land?

This witness was permitted to testify extensively as to the adaptibility of Ellis' "Storer Field" property for a regional shopping center, but when it became apparent that he was neither a real estate broker nor an appraiser and had a limited knowledge of the value of real estate in the Toledo area, the court declined to let him testify as to his valuation of the appropriated land.

Most of the cases hold that the qualification or competency of a witness to testify as an expert or to give his opinion on a particular subject rests with the trial court, and, on appeal, its rulings with respect to such matters will ordinarily not be reversed unless there is a clear showing that the court abused its discretion. 5 Corpus Juris Secundum, 502, Appeal and Error, Section 1604, and note (1); 3 American Jurisprudence, 535, Section 975; annotation, 166 A. L. R. 1067.

In our view, the above rule is applicable here, and the court acted within its prerogatives in ruling as it did. Besides the testimony Welch would have given as to value would have been cumulative. Other witnesses called by Ellis were allowed to give their opinions on this subject and their testimony was favorable to Ellis' contentions.

Nor do we think the trial judge erred when he advised the jury that Ellis' testimony as to the value of his appropriated land, based upon its adaptability for the construction of a shopping center, should be considered as testimony of an owner of real estate rather than that of an expert. Ellis had never built a shopping center for himself or for anyone else and what knowledge he had on the subject was confined to information imparted to him by others.

In his opening statement to the jury, one of counsel for the commission related what the evidence would show in regard to Ellis' ability legally to secure a right of way over the tracks of a railroad which traversed his land. Under the conditions which existed such remark was probably incorrect and erroneous. No objection, however, was taken

to it at the time it was made. At a later date one of Ellis' counsel claimed misconduct in the making of the statement and moved the court "for mistrial and withdrawal of a juror." Such motion was overruled.

Conceding that the statement referred to was incorrect and that the court should have, upon request, eliminated it from the consideration of the jury, there is no indication that it was malicious or deliberately made. We do not think it was of such a serious or consequential nature as to require the drastic course of declaring a mistrial. The strong probabilities are that the jury gave this matter little, if any, attention.

Ellis has belatedly filed in both causes Nos. 34430 and 34431 cross-assignments of error and accompanying briefs wherein he calls attention to other errors occurring in the trial of both causes, which he claims were prejudicial to his rights and entitled him to new trials. See paragraph eight of the syllabus of *Clark v. Stewart,* 126 Ohio St., 263, 185 N. E. 71.

We consider most of the errors complained of as inconsequential and of no controlling significance. They relate generally to the admission and exclusion of evidence, errors of omission and commission in the court's charge, abuse of discretion in limiting the time for final argument to the jury to one and one-half hours to each side, and the claim that the judgments rendered by the Court of Appeals were not final and consequently not appealable.

There is one question, however, which Ellis raises in his cross-assignment of error which is worthy of discussion. This relates to the admissibility in evidence of the price which Ellis paid for the real property involved several years prior to the institution of the appropriation proceedings.

We agree with the Court of Appeals that such evidence was admissible.

The decided weight of authority supports the proposition that evidence as to the price paid by the owner for

property which it is desired to appropriate is admissible as bearing on its value at the time it is taken, providing the purchase was not made so long before the appropriation as to afford no fair measure of present value. 29 Corpus Juris Secundum, 1267, Eminent Domain, Section 273; 18 American Jurisprudence, 994, Section 351; *Thorton v. City of Birmingham,* 250 Ala. 651, 35 So. (2d), 545, 7 A. L. R. (2d), 773.

Again, much must be left to the discretion of the trial court in the matter of admitting or rejecting evidence relating to the value of appropriated property. Evidence of this character generally goes to the weight of the evidence rather than to its admissibility. *Foster v. United States* (C. C. A., 8), 145 F. (2d), 873, 875.

These two appropriation proceedings were long and costly affairs. We have examined the voluminous records in both cases, and it is our opinion that the juries had before them a complete picture of the whole situation, and that acting as appraisers of Ellis' property actually taken and of the damage done to the remainder by reason of the construction of the turnpike through it, they, the juries, were able to and did fix fair, if not liberal, valuations in the respects mentioned.

Of course, any owner who is involuntarily deprived of his property by an appropriation proceeding should be accorded just and adequate compensation for his loss, but that does not mean that the appropriator should be penalized by requiring it to pay a greater sum than the true value of the property taken, considering all proper and pertinent factors.

We recognize that errors were no doubt committed by the trial court during the progress of the proceedings. But we do not consider them of such a serious, prejudicial or pernicious nature as to require or warrant a reversal of the judgments of that court.

The dissenting judge in the Court of Appeals applied the part of Section 2309.59, Revised Code, which recites

that no judgment shall be reversed by reason of errors or defects in the proceedings, where such errors or defects do "not affect the substantial rights of the adverse party." We think he was justified in doing so.

Therefore, the judgments of the Court of Appeals in both causes Nos. 34430 and 34431 are reversed, and the judgments of the Court of Common Pleas in such causes are affirmed.

Judgments reversed.

Weygandt, C. J., Matthias, Hart, Stewart and Bell, JJ., concur.

Taft, J., concurs in paragraphs three, four, five, six, seven, eight and nine of the syllabus and in the judgment.

APPENDIX C

ENTRY ON VERDICT

IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

Matter of Appropriation by Ohio Turnpike Commission of Property of Cooley Ellis, et al.	No. 177840

ENTRY ON VERDICT

(Filed December 28, 1953)

This cause came on to be heard upon the application of the Ohio Turnpike Commission for the assessment of compensation and damages. Thereupon on December 10, 1953 a jury was impanelled and sworn. The issues as to compensation and damages were submitted to said jury, and after due deliberation, said jury returned a verdict for $40,000.00 as compensation for the property taken and $56,825.00 as damages to the residue of the property, such verdict thus being for the total sum of $96,825.00.

In conformity with said verdict, it is hereby ordered, adjudged, and decreed that the Ohio Turnpike Commission shall deposit in this Court the said sum of $96,825.00 which sum shall be paid by the Clerk, pursuant to subsequent order of the court, to the owners herein as their interests may appear upon a hearing for distribution.

Further, in conformity with said verdict, it is ordered, adjudged, and decreed that the property, easements, rights, and restrictions described in the application, the same being more particularly described as follows:

Parcel No. 51-B—Fee Simple

Situated in the City of Maumee, County of Lucas and State of Ohio and known as being part of Lots Nos. 39, 40, 41 and 47 in Sylvan Park as shown by plat recorded in Volume 6, page 18 of Lucas County Map Records and part of Private Grant 581 in Town 3, United States Reserve of 12 miles square at the foot of the rapids of the Miami of Lake Erie, and bounded and described as follows:

Beginning in Southerly line of land conveyed to the City of Toledo by deeds dated May 1, 1931 and recorded in Volume 858, page 75 of Lucas County Deed Records at its intersection with a line parallel to the center line of Ohio Turnpike Project No. 1, as shown by plat recorded in Volume 50, page 20 of Lucas County Map Records and distant Northeasterly there from 160.00 feet, measured on a line normal to said center line; thence Northwesterly along said parallel line to the Northwesterly line of land conveyed to the City of Toledo as aforesaid; thence Southwesterly along said Northwesterly line to its intersection with a line parallel to said center line and distant Southwesterly there from 160.00 feet, measured on a line normal to said center line; thence Southeasterly along said parallel line to the Southerly line of land conveyed to the City of Toledo as aforesaid; thence Easterly along said Southerly line to the place of beginning.

Parcel No. 51-C—Fee Simple

Situated in the City of Maumee, County of Lucas and State of Ohio and known as being part of Private Grants Nos. Five hundred eighty (580) and Five hundred eighty-one (581) in the United States Reserve of twelve (12) miles square at the foot of the rapids of the Miami of Lake Erie and bounded and described as follows:

Beginning in the Southeasterly line of Detroit Avenue as now established at its intersection with a line parallel to the center line of Ohio Turnpike Project No. 1, as shown by plat recorded in Volume 50, page 20 of Lucas County Map Records and distant Southwesterly therefrom 160.00 feet, measured on a line normal to said center line; thence Southeasterly along said parallel line to the Northwesterly line of land conveyed to the City of Toledo by deed dated May 1, 1931 and recorded in Volume 858, page 75 of Lucas County Deed Records; thence Northeasterly along said Northwesterly line to its intersection with a line parallel to said center line and distant Northeasterly therefrom 160.00 feet, measured on a line normal to said center line; thence Northwesterly along said parallel line to the Southeasterly line of the abandoned Miami and Erie Canal; thence Southwesterly along said Southwesterly line to the Southeasterly line of Detroit Avenue; thence Southwesterly along said Southeasterly line of Detroit Avenue to the place of beginning.

Parcel No. 51-C(1)—Permanent Easement for Water-Line Purposes

Situated in the City of Maumee, County of Lucas and State of Ohio and known as being part of Private Grant No. 581 in the United States Reserve of Twelve (12) Miles Square at the foot of the Rapids of the Miami of Lake Erie and being bounded and described as follows:

Beginning on a line parallel to and distant 160 feet Northeasterly of, measured on a line normal to, the center line of Ohio Turnpike Project No. 1, as shown by plat recorded in Volume 50, Page 20 of Lucas County Map Records at its intersection with the Southeasterly line of the abandonded Miami and Erie Canal; thence Southeasterly along said parallel line to a point normal to said center line of Ohio Turnpike Project No. 1 at Station 740+15; thence Northerly to

a point distant 70 feet Southeasterly, measured at right angles, from a point on the center line of Anthony Wayne Trail, distant 304 feet Northeasterly, measured along said center line, from its intersection with the center line of Ohio Turnpike Project No. 1; thence Southwesterly in a direct line to the place of beginning.

The aforementioned rights and restrictions to be appropriated are as follows:

First: Any and all abutters' rights, including access rights, appurtenant to any remaining portion of the lands of said owner or owners of which the above-described real estate shall have formed a part prior hereto, in, over, or to the parcels described above as Parcels Nos. 51-B and 51-C, including such rights to any turnpike constructed thereon.

Second: All rights to erect on any of the aforesaid remaining lands any billboard, sign, notice, poster, or other advertising device which would be visible from the travelway of Ohio Turnpike Project No. 1, and which is not now upon said lands.

be and the same hereby are duly vested in the State of Ohio, free and clear of all claims of the owners of said land and persons having interests therein, to-wit: Cooley Ellis, Mary Ellis, Ruth E. Slater, formerly Ruth E. Ellis, Joel S. Rhinefort, John Coughlin Kumler and Joyce Kumler, Roy W. Kumler and Isabel Kumler, John L. Kumler, Ann C. Kumler, John F. Kumler, heirs, devisees and legal representatives of Mary M. Kumler, heirs, devisees and legal representatives of John F. Kumler, Sr., heirs, devisees and legal representatives of Frederick A. Kumler, deceased, The Maumee Investment Company, The Ohio Citizens Trust Company, County Auditor of Lucas County and County Treasurer of Lucas County.

To the foregoing findings, orders, judgments, and decrees, and each of them, the owners Cooley Ellis and Mary Ellis, separately except.

It is further ordered that the Ohio Turnpike Commission pay all court costs herein accrued and that a record be made of these proceedings according to law.

Hackett, J.,
Judge.

Frank C. Dunbar, Jr., General Counsel
James L. Stegmeier, Condemnation Attorney

Fuller, Harrington, Seney & Henry
Special Counsel for Ohio Turnpike Commission

Taylor, Cruey & Kelb
Attorneys for Cooley Ellis

OPINION

IN THE COURT OF APPEALS OF OHIO

SIXTH CIRCUIT, LUCAS COUNTY

In the Matter of Appropriation of the Property of Cooley Ellis by Ohio Turnpike Commission	No. 4778

OPINION

February 17, 1955

(Hurd P. J., Kovachy J., Skeel J. of Eighth District sitting by designation in the Sixth District.)

Appearances: For Plaintiff Appellant: Taylor, Cruey & Kelb.

For Defendant Appellee: Frank C. Dunbar Jr. Gen'l Counsel Fuller, Harrington, Seney & Henry.

Hurd, P. J.

This is an appeal on questions of law from a judgment entered upon the verdict of a jury in an action originating in the common pleas court of Lucas County. Plaintiff-appellant is Cooley Ellis, the land owner, and defendant-appellee is the Ohio Turnpike Commission, the parties being sometimes referred to herein, respectively as "Ellis" and the "Commission."

This appeal involves a proceeding instituted by the Commission to appropriate property of the landowner familiarly known as "Storer Field" consisting of an irregularly shaped tract of land of approximately forty-five acres, lying north and east of the intersection of the Anthony Wayne Trail and Detroit Avenue in the City of Maumee, and in the vicinity of the property involved in an action between the same parties in appeal No. 4777 on the docket of this Court. The property is bounded by the two highways mentioned and by the right of way of the Toledo Terminal Railroad and by privately owned lands.

It is the contention of appellant that because of the location of this property and its ready accessibility from other parts of Toledo and Lucas County, by reason of the main arterial highways converging at and near the property, the same is ideally suited for the development of a shopping center, it being conceded by both parties that the entire property has been zoned for commercial purposes. It is also conceded that the right of way of the Ohio Turnpike cuts diagonally across and through the property in an easterly and westerly direction from the intersection of the two highways upon which the property abuts.

It is further the contention of the appellant that because of the non-access features of the Anthony Wayne Trail and because the residue of the property, after the taking, is landlocked, there is a complete isolation and

total destruction of the valley of that portion lying northerly of the right of way with the result that only twenty-two acres of land remain accessible and that this tract of twenty-two acres is too small for the development of the contemplated regional shopping center.

The jury returned a verdict for Ellis in the sum of $40,000 for eight and five-tenth (8-5/10) acres, as compensation for the land taken for the turnpike right of way, and $56,825.00 as damages to the residue, or a total sum of $96,825.00.

The property owner contends that as the entire value of the property is lost for all practical purposes, the verdict is grossly inadequate as the direct result of errors committed in the trial of the cause.

Appellant assigns as ground for reversal many errors, some of which were likewise assigned in cause No. 4777. The errors assigned are as follows:

1. The court erred in refusing to dismiss this proceeding at the preliminary hearing, and in overruling the owner's motion to dismiss, the undisputed evidence showing that there was a failure to comply with mandatory provisions of the statute, Sec. 5537.06 R. C., requiring a bona fide offer and a resolution declaring the necessity of the appropriation before such proceeding may be brought.

2. The owner was deprived of a fair trial by the misconduct of counsel for the commission in his opening statement and the court erred in denying a mistrial and in failing to take any action to withdraw this matter from the consideration of the jury.

3. The court erred in admitting evidence of what Ellis had paid for the subject property.

4. The court erred in admitting evidence of the price paid for other properties and in refusing to exclude this evidence from the jury.

5. The court erred in admitting a purported financial statement of Ellis, Exhibit 37, in evidence, and in refusing to withdraw this exhibit from the consideration of the jury.

6. The court erred in permitting the witness, Schenck, to testify as to his opinion of values.

7. The court erred in permitting the witness, Rupert, to testify as to his opinion of values.

8. The court erred in excluding the testimony of the witness, Welch, as to his opinion of values.

9. The court erred in excluding evidence of the potential sales of the shopping center which represented the best use of the subject property.

10. The court erred in excluding plans and diagrams Exhibits 17-a and 17-b, which illustrated the best use of the property.

11. The court erred in excluding a lease of a part of the property, Exhibits 32 and 32-a, and in refusing to permit the cross-examination of the Commission's experts in relation thereto, or in relation to rentals generally.

12. The court erred in excluding a notice relating to a sale of one of the alleged comparable properties (Exhibit 41).

13. The court erred in stating in the presence of the jury that Ellis was not qualified as an expert to testify as to the limited use of his remaining property after the appropriation.

14. The court erred in refusing to receive evidence in rebuttal relating to traffic.

15. The court erred and abused its discretion in limiting time for argument.

16. The court erred in giving to the jury before argument request No. 2 of the Commission.

17. The court erred in its general charge to the jury in charging on the subject of the sign rights and in failing to charge on the abutter's rights appropriated.

18. The verdict and judgment are each contrary to the manifest weight of the evidence.

We shall not discuss these assignments of error seriatim nor shall we here discuss at length assignments of error passed upon in Appeal #4777, between the same parties, covering other lands, which are common to both appeals.

Error is assigned to the effect that counsel erroneously was permitted in his opening statement to the jury, to say:

> "The evidence will show that under the law it is possible to get private right of way over the railroad. The Terminal Railroad runs down here. The evidence will show that the law permits under certain circumstances, private right of way so we believe that when you hear all the evidence, you will conclude that isn't isolated—so that—forever—so that you can get into that other than by hellicopter or balloon."

The record shows that before the introduction of evidence, counsel for the owner requested that the foregoing statement be withdrawn from the jury, which was overruled by the court. Counsel for the Turnpike Commission argue that refusal to withdraw from the jury such a statement was not erroneous, citing Gratz vs Lake Erie & Western R. R. Co., 76 O. S. 230, in which it was held that irrespective of the statute, one who holds property on both sides of a railroad, regardless of when acquired, has a right to install a private crossing at his own expense. That case has no application to the instant case. Here, the evidence clearly shows that Ellis does not own the property on both sides of the railroad, as the railroad itself forms a border to the owner's land and even if he were able to acquire a right of way across the railroad,

which is doubtful, it would be of no value, unless in some way he acquired the land on the other side of the railroad. We think this statement of counsel, which obviously could not be substantiated by evidence, was prejudicial and an error which could have been cured if the trial court had granted the motion to withdraw the statement from the jury, which the trial court upon request refused to do. It is true that considerable latitude is allowed counsel in opening statements but counsel should not be permitted to make statements of law or fact which are obviously erroneous or over objection discuss questions of law with the jury in opening statements, questions of law being peculiarly within the exclusive jurisdiction of the court. In this case, a specific request having been made to instruct the jury to disregard the statement and the same having been overruled, we think assignment of error is well taken and should be sustained.

The case of Breymann v. Penna. R. R. Co., 43 O. App. 473, while relating to similar conduct in final argument, should be equally applicable to opening statements when attention of the trial court is timely directed to the statements with the request to withdraw the same before evidence is presented. In that case the court said at page 480:

> "Plaintiffs in error claim that to so argue was improper, and that the court should have intervened and said so to the jury. We also think that this should have been done. This court has heretofore emphasized the duty of a trial judge in this regard, and repetition will serve no good purpose. Suffice it to say, a trial judge may not remain silent when his attention has been called to a patent impropriety, however inadvertent and unintentional it may have been on the part of counsel. Unfortunately, righteous motives expressed in inept words are likely to be misunderstood. Counsel did not retract what he said, the court remained silent, and it is difficult to say what effect this statement of counsel had upon the minds of the jurors when they came to deliberate upon

what the verdict should be. The suggestions made by counsel gave the jury an opportunity to play upon their imaginations as to possibilities that in fact should not have been considered by nor suggested to them, and we are therefore of the opinion that to so argue without retraction by counsel or suggestion by the court as to its impropriety, under the circumstances presented by the record, was prejudicial error."

Errors are assigned to the exclusion of certain testimony of one Kenneth C. Welch of Grand Rapids, Michigan, a witness for the owner, and to the exclusion of certain plans and sketches marked Exhibits 17-a and 17-b prepared by him, as showing the highest and best use of the subject property.

The record contains an imposing list of the qualifications of this witness as an expert, a detailed recital of which is unnecessary here. It should be noted, however, that he qualified as an expert city planner, consultant and architect, primarily in respect to commercial areas, including regional and community shopping centers. He had made numerous surveys of properties for regional and community shopping centers involving three burroughs in New Yok City,—Kings, Queens and the Bronx; one in Philadelphia; two in the Kansas City area; one in Omaha, Nebraska; and Dearborn, Michigan; two in Canada—Hamilton and Toronto; a center halfway between Bridgeport and New Haven, Connecticut and what is more important, as far as this case is concerned, four in the Toledo area, one each at the corner of Sylvania and Douglas; Franklin Field; Secor and Central Avenues and one known as the Village Shopping Center.

He testified that in arriving at a conclusion as to the highest and best use and maximum value of Storer Field, he took the following factors into consideration; access to traffic; concentration of population; drawing power of center; time distance; competition; purchasing power of people in area; past retail sales in the area by types;

annual sales in dollars and cents; influence of the turnpike; zoning; highway capacity; future growth of the area, and terrain (natural contours).

We think the record shows this witness eminently qualified by reason of education, knowledge and experience, particularly in respect to his previous surveys of four other Toledo properties used as shopping centers, to testify as to his opinion of the highest and best use of the subject property and its maximum value for such use.

Evidence was produced tending to show that Storer Field was ideally situated and that its highest and best use was as a regional shopping center, this being the type of center on which is located stores of all classes of merchandise.

The plans, sketches and lay-outs (marked Exhibits 17-a and 17-b) were properly identified but objection was sustained to the offer in evidence of these exhibits, as illustrating the highest and best use of the property, on the ground that it was an attempt to *show a particular use of the property*, as distinguished from a *general use*. A proffer was made for the record, but the plans were excluded. The witness testified that he was familiar with the value of commercial properties in the vicinity of the subject property, but on objection was not permitted to testify as to his opinion of the values of the subject property at the time of the taking, or as to the use and value of the remainder after taking.

The record shows that the witness was asked as to the best use of the remainder after the appropriation of the right of way. The record then shows the following:

"* * *

> I am going to ask you to state whether or not—what, in your opinion, would be the best use of that property after the appropriation of the right-of-way indicated there, by the Ohio Turnpike?

Mr. Harrington: If that is calling for a general use, I have no objection; *if he is calling for a particular use we do object.*

Mr. Cruey: We have already had evidence of what the entire parcel's best use would be. Certainly, after the Turnpike acquired it, he should be able to testify what the best use of the remainder was.

The Court: Ladies and gentlemen of the jury, you may retire again. (Thereupon the jury retired to the jury room.)

The Court: *The trouble with that question is if he gives his opinion as to the best use, that is a particular use.*

Mr. Taylor: That is true, your Honor, but we can also show the best use of the property, that would be true.

The Court: *Any particular use. That is the trouble with the question.*

Mr. Harrington: That's what he started to give.

The Court: That's what he wants to give, as a matter of fact. No doubt about that.

Mr. Taylor: *In order to give the best use of a piece of property, your Honor, you give a particular use. You can't help it.*

The Court: *THEN IT IS IMPROPER.*

Mr. Taylor: It is necessarily included. The Schaeffer case says you can show the highest and best use of the property.

Mr. Harrington: *Not a particular use.*

The Court: *NOT A PARTICULAR USE, AND IT SAYS THAT IN PLAIN WORDS.*"

From the foregoing, and other evidence, in the record, it is clear in this case as in appeal #4777, that counsel for the Turnpike Commission, as shown by their objections, and the trial judge as shown by his rulings, were of the opinion that it was improper to show any particular use of the subject property, even though the exclusion of such evidence prevented the land owner from producing evi-

dence as to the best and highest use of the property. By reason of the exclusion of such testimony by the expert witness, the land owner's offer to show the highest and best use of the property and the maximum value for any purpose for which its use was available was denied.

We are of the opinion that evidence tending to show a particular use was admissible because in logic and reason the highest and best use of the property cannot be shown without giving one or more particular uses for which it may be available. It is our view that the objection that such evidence is interdicted by the case of Sowers, Supt. v. Schaeffer, 155 O. S. 454, is not well taken.

An examination of the facts of the Schaeffer case, and the case of Goodin v. Cincinnati & Whitewater Canal Co., 18 O. S. 169, is necessary to a correct interpretation of the phrase "not for any particular use" carried into syllabus 3 of the Schaeffer case.

Without detailing the facts at length in the Schaeffer case supra, suffice it to say that in all there were forty buildings on the property, thirty-four of which were homes owned either by the Schaeffers or by various lessees; six of the buildings were classed as commercial buildings. The complaint in that case was made that it was not proper on direct examination to admit testimony as to the income from the business conducted on the property. The court passing on that question stated: that there was no testimony admitted as to income from businesses on the property, but testimony was received as to the rentals which Schaeffer received from the dwellings, and as to the nature of the business as to which the property was adapted. The court held that such testimony was competent.

In so holding the court said, at page 458:

> "In our opinion, this testimony was competent. In estimating the value of property in an appropriation proceeding, it must be valued as to its worth generally, not for any particular use, but for any and all uses for which it may be suitable.

> The true value of anything is what it is worth when applied to its natural and legitimate uses—its best and most valuable uses. Goodin v. Cin. & Whitewater Canal Co., 18 O. S. 169.
>
> In ascertaining the amount which should be allowed in an appropriation proceeding, the jury should take into account not only the purposes for which the land is or has been applied, but any other beneficial purpose to which it may be applied. Cin. & Springfield Ry. Co. v. Exers. of Longworth, 30 O. S. 108.
>
> In the present case, the property involved was developed for recreation, summer home and permanent home purposes, and in ascertaining its value as a whole it is essential to show the value of the improvements, the rental value thereof and the nature of the businesses which can be suitably carried on upon the premises."

The facts in the case of Goodin v. Cin. & Whitewater Canal Co. supra, are much more complicated and we shall advert to only such as bear upon the present issue.

In that case, Welch, J. speaking for a unanimous court, discussed inter alia the question of the value of the property of the Canal Company under appropriation proceedings. The facts showed that through fraudulent means the president and directors of the Railroad Company had gained control of the Canal Company and then transferred the property of the Canal Company to the Railroad Company at a grossly inadequate price, under an agreement which could not be sustained in equity and the only remedy remaining was by condemnation proceedings. As the railroad had already acquired the property as a railroad right of way, the court found in a suit brought by minority stockholders of the Canal Company, *that the property was of little value as a canal*, that as such it was "*played out*" and "*of no value as a canal*".

The court held that the estimate should have been of its value generally for any and all uses and *not for any par-*

ticular use such as a canal, which as such had no value, the court qualifying the words "and not for any particular use" with the words "and especially not for any inferior, or non-appropriate use." This doctrine was embodied in the fourth paragraph of the syllabus which reads as follows:

> "The rule of valuation in such cases is what the interest of the canal company was worth, not for canal purposes merely, or for any other particular use, but what it was worth generally, for any and all uses for which it might be suitable."

We can readily deduce from the Schaeffer case and from the Goodin case that the words "not for any particular use" were used for the benefit of the land owner, and not for the benefit of the condemner. That is, in arriving at a conclusion of the value of the land taken, the land owner is not limited to evidence of any particular use, but may present evidence "for any and all uses for which it might be suitable." Applying the language of the Goodin case in which it was first used, it is clear that the Canal Company was not confined in evidence to a showing of what the land was worth for "*canal purposes merely, or for any other particular use* but what it was worth generally for any and all uses for which it might be suitable." (Emphasis added.) In other words, the phrase "not for any particular use", as used in the syllabus of the Schaeffer case, and the phrase, "not for canal purposes merely, or for any other particular use" contained in the syllabus of the Canal case, were words not of limitation upon the land owner as contended by counsel for the Commission, and concurred in by the trial court, but words of limitation upon the condemner by reason of which the condemner could not prevent a showing of the maximum value to the owner for any and all purposes for which the use of the land was available, including one or more particular uses—the weight of such testimony being for the jury under proper instructions.

This interpretation is confirmed by the later supreme court case of Langenau v. City of Cleveland, 159 O. S. 525 (1953) syllabus 3, which reads:

"It is the duty of the court in an appropriation proceeding to afford the property owner the right to fully show the extent and character of the real estate proposed to be taken and its maximum value for any purpose for which its use is available, including the use which is presently made of it." (Emphasis added.)

As to the plans, sketches and layouts proffered in evidence and rejected by the court, we hold that the same were admissible for the reasons above set forth, and for the reasons discussed in our opinion in the case of Ellis v. Turnpike Commission, decided by this court in appeal #4777, on the docket of this court, in support of which we cited Railway v. Longworth, 30 O. S. 108; Sowers, Supt. v. Schaeffer, 155 O. S. 454 and Langenau v. City of Cleveland, supra.

We hold, therefore, that the testimony of the witness, Welsh, except as to estimated potential income from commercial business, should not have been excluded, either on the ground that the same was an attempt to show a particular use, or that he did not show sufficient qualifications to permit him to testify as to the highest and best uses of the subject property and its maximum value for which its use was available.

Error is likewise assigned here, as in Appeal #4777, to the admission of evidence, concerning sales of alleged comparable properties, concerning a sale of 8.8 acres of land by the county commissioners of Lucas County, by advertisement in a newspaper requiring sealed bids subject to a condition that the purchaser waive any claim for damages by reason of the construction of the Ohio Turnpike. We held in Appeal #4777 that the admission of evidence of this character as a comparable sale was erroneous as it was subject to unusual conditions of waiver and was not in the nature of a free sale negotiated between a willing seller who was not obliged to sell and a willing purchaser who was not obliged to purchase. However, additional error is assigned here because on objection the court excluded from the evidence Exhibit No. 41 being

a legal notice of said sale by the Commissioners, setting forth in substance that the Board of County Commissioners of Lucas County would offer for sale upon receipt of sealed bids the property therein described by metes and bounds for cash to the highest responsible bidder, the successful bidder and purchaser being required to furnish a written waiver of any and all claims for damages to said real estate by reason of the construction of the Ohio Turnpike. The record shows that Exhibit No. 41 was offered, refused and then re-offered, and again refused, despite the fact that comparable testimony was allowed in Appeal No. 4777. Assuming for the purpose of discussion only, that the court was correct in admitting the evidence of this sale, it certainly was prejudicial error in any event to exclude evidence of the unusual terms and conditions under which the sale was conducted by the county commissioners.

Complaint is also made that the court, in the presence of the jury, remarked that Ellis was not competent as an expert to testify as to the limited use of the remaining property. The evidence shows that he was a developer of real estate and a builder for twenty-eight years and in addition thereto had made a study of shopping centers with a view to building a shopping center on the subject property.

Considering all evidence appearing in the record, it is our opinion that he showed ample qualifications to testify as an expert as well as an owner of real estate and the ruling and comment of the court that he was not an expert, while not necessarily prejudicial, was erroneous because it unnecessarily deprecated in the presence of the jury the testimony of the owner and may have had an adverse effect upon his testimony as a witness.

Coming now to a consideration of the complaint that the judgment is manifestly against the weight of the evidence, there certainly is grave doubt as to the adequacy of the verdict, but the three judges being unable to agree that the verdict is manifestly against the weight of the evidence, this assignment of error is overruled.

Error is assigned because of refusal of the court to receive testimony in rebuttal relating to traffic conditions for which counsel for Ellis sought a short continuance from 3 P. M. to the following day at 9 A. M., when the Commission rested its case prior to the time its counsel had indicated. We think this was a matter within the sound discretion of the court, but as the request was a reasonable one, we think it should have been granted, which could easily have been done without any prejudice to the Commission.

Error is assigned in this case, as in Appeal No. 4777, that the court erred in admitting a purported financial statement of Ellis which the evidence failed to show was authorized by him but which purportedly had been used in litigation incident to a divorce case between Ellis and his former wife, which extended for a period of more than three years and terminated in a divorce in August, 1951, a little over two years before this appropriation case was instituted. This financial statement, marked Exhibit 37 in this case, was allowed in evidence over the objection of Ellis and the court overruled a motion to withdraw the same from the consideration of the jury.

For the reasons stated at some length in our opinion in Appeal No. 4777, we hold that the domestic difficulties of Ellis with his former wife and his total financial worth represented by the statement (the subject property being shown at cost six years before) should not have been admitted in evidence and the request to have it withdrawn from the consideration of the jury should have been granted. The statement was completely irrelevant to any issue in this case and was highly prejudicial as discussed in our opinion in Appeal No. 4777.

Error is here assigned in permitting the witness (Schenck) for the Commission to testify as to sales and values of other properties, based solely and exclusively on information gleaned from examination of public records, considerations shown on deeds and computation of revenue stamps on deeds.

For the reasons set forth in our opinion in Appeal #4777, decided contemporaneously herewith, we hold that such evidence was inadmissible and constituted error, as mere hearsay, and inadequate proof of the competency of the witness. Furthermore, public documents speak for themselves and if their contents are admissible for any purpose, the best evidence rule requires their production in open court.

We have reviewed the other errors assigned herein, but find no others of a prejudicial nature.

It is our view, however, that for the reasons herein set forth the appellant was not afforded a fair trial and that therefore the judgment of the Court of Common Pleas should be and the same is reversed and the cause remanded for further proceedings according to law.

A journal entry may be drawn in accordance herewith. Exceptions noted.

Kovachy J. Concurs.

Skeel J. Dissents for the reasons as set forth generally in the dissenting opinion filed in Appeal No. 4777, rendered contemporaneously herewith.

APPENDIX D

DECISION OF THE SUPREME COURT

Ellis, Appellant, v. Ohio Turnpike Commission, Appellee.

Solether, Appellee, v. Ohio Turnpike Commission, Appellant.

Ohio Turnpike Commission—Authority and powers statutory—Right to prohibit billboards, etc., on land adjacent to highway—Not authorized to acquire by appropriation proceedings, when—Commission's resolution prohibiting advertising devices within visible distance of highway—Invalid and unenforceable for indefiniteness, when.

1. The Ohio Turnpike Commission is a statutory body and possesses only such authority and powers as are conferred on it by enactments of the General Assembly.
2. The Ohio Turnpike Act (Sections 5537.01 to 5537.23, inclusive, Revised Code) does not authorize the Turnpike Commission to acquire by appropriation proceedings the right to prohibit the erection and maintenance of billboards, signs, notices, posters or other advertising devices on the remaining lands of an owner whose property is taken for turnpike construction purposes.
3. Even if existing statutory authority were sufficient to enable the Ohio Turnpike Commission to acquire by appropriation proceedings the right to prohibit the erection of billboards, signs, notices, posters or other advertising devices on the remaining lands of an owner whose property is taken for turnpike construction purposes, an appropriation resolution adopted by the commission

which denies a property owner the privilege to erect such advertising devices at a distance within which they would be visible from the travelway of the turnpike is too indefinite and uncertain to be valid and enforceable.

(Nos. 33868 and 33901—Decided June 30, 1954.)

Appeal from the Court of Appeals for Lucas county.

Appeal from the Court of Appeals for Wood county.

These two cases involve the same primary question, viz., the right of the Ohio Turnpike Commission to acquire by appropriation proceedings the right to prohibit the erection of billboards, signs, notices, posters or other advertising devices on the remaining lands of the owner whose property is taken for turnpike construction purposes. Because of this primary question, both cases will be considered and decided together.

Cause No. 33868, hereinafter referred to as the Ellis case, originated in the Court of Common Pleas of Lucas County. Ellis, the owner of two 50-acre tracts of land in Lucas county, one situated in the city of Maumee and the other in the cities of Toledo and Maumee, seeks to enjoin the Turnpike Commission from imposing on such land by appropriation a servitude whereby no billboards, signs and other advertising media may be placed thereon. A demurrer to the petition was sustained by the trial court and the petition dismissed. An appeal on questions of law and fact was perfected to the Court of Appeals where the petition was dismissed with prejudice and judgment was rendered for the Turnpike Commission with costs.

The cause is before this court on appeal as of right and pursuant to the allowance of a motion to certify the record.

Cause No. 33901, hereinafter referred to as the Solether case, had its inception in the Court of Common Pleas of Wood County. In this action, too, Solether, the owner of land in Lake township, Wood county, asks for an injunction "restraining and prohibiting the defendant [Turnpike Commission] from the acquisition of the rights she [Solether] may have to signs or/and other advertising devices set

forth in its action brought against her in cause No. 32866 and pending in this court."

As in the Ellis case, a demurrer to the petition was sustained by the trial court and the action dismissed. However, on an appeal on questions of law to the Court of Appeals, that court, by a majority vote, decided that the petition is sufficient as against demurrer and remanded the cause for further proceedings.

In its opinion the Court of Appeals said:

"* * * a majority of this court conclude that an owner whose property rights are sought to be appropriated by the Turnpike Commission has the right to institute an action for a judicial determination upon the evidence adduced at the trial thereof—(1) whether the taking of such rights is reasonably necessary to the operation of the turnpike, and (2) whether such rights are to be taken for a public purpose. * * * If the evidence should disclose that the taking is unnecessary or not for public use, it follows that such attempted taking is unreasonable and unlawful."

The allowance of a motion to certify the record brings the Solether cause here for review.

Messrs. Gorman, Silvertsteen & Davis and *Messrs. Taylor, Cruey & Kelb,* for appellant in cause No. 33868.

Mr. Frank C. Dunbar, Jr., Messrs. Fuller, Harrington, Seney & Henry, Mr. Thomas L. Dalrymple and *Mr. John J. Duffey,* for appellee in cause No. 33868.

Messrs. Bowman, Hanna & Middleton and *Mr. R. A. D'Amico,* for appellee in cause No. 33901.

Mr. Frank C. Dunbar, Jr., Messrs. Avery & Avery, Mr. Frank A. Harrington and *Mr. Joseph D. Bryan,* for appellant in cause No. 33901.

Zimmerman, J. This court has heretofore upheld the validity of the Ohio Turnpike Act with its establishment of the Turnpike Commission. See *State, ex rel. Allen, v. Ferguson, Aud.,* 155 Ohio St., 26, 97 N. E. (2d), 660, and *State, ex rel. Ohio Turnpike Commission, v. Allen, Secy.-Treas.,*

158 Ohio St., 168, 107 N. E. (2d), 345, certiorari denied, 344 U. S., 865, 97 L. Ed., 671, 73 S. Ct., 107.

Both Ellis and Solether contend that their petitions are good and that the Turnpike Commission is attempting to exercise authority in violation of constitutional provisions and beyond the rights of appropriation conferred by statute. In making such contentions several propositions are advanced, among them being:

1. The provisions of the Ohio Constitution relating to the appropriation of property for public use are not a grant of power but a limitation thereon, and the taking of property must not only be for a public use, but for a *necessary* public use.

2. The taking of private property for what is essentially a private use by a public or quasi-public agency, such as the Turnpike Commission, is an unconstitutional exercise of power.

3. The Ohio Turnpike Act itself limits the power of the Turnpike Commission to appropriate lands for any purpose other than the construction and reasonable operation of a turnpike.

It must at once be recognized that the Turnpike Commission is a creature of statute and possesses only such authority and powers as may be conferred on it by enactments of the General Assembly.

Section 5537.03, Revised Code, relating generally to turnpike projects, reads:

"In order to remove the present handicaps and hazards on the congested highways in this state, to facilitate vehicular traffic throughout the state, to promote the agricultural and industrial development of the state, and to provide for the general welfare by the construction of modern express highways embodying safety devices including center divisions, ample shoulder widths, longsight distances, multiple lanes in each direction, and grade separations at intersections with other highways and railroads, the commission is hereby authorized and empowered to construct,

maintain, repair, and operate turnpike projects at such locations as are approved by the Governor, and in accordance with such alignment and design standards as are approved by the director of highways, and issue turnpike revenue bonds of this state, payable solely from revenues, to pay the cost of such projects."

Section 5537.04, Revised Code, contains a detailed description of the authority and powers of the Turnpike Commission and provides, *inter alia:*

"The commission is hereby authorized and empowered to:

"• • •

"(E) Construct, maintain, repair, police, and operate turnpike projects, and establish rules and regulations for the use of any such turnpike project;

"• • •

"(I) Acquire, in the name of the state, by purchase or otherwise, on such terms and in such manner as it deems proper, or by the exercise of the right of condemnation in the manner provided by Section 5537.06 of the Revised Code, such public or private lands, including public parks, playgrounds, or reservations, or parts thereof or rights therein, rights of way, property, rights, easements, and interests as it deems necessary for carrying out Sections 5537.01 to 5537.23, inclusive, of the Revised Code, and full compensation shall be paid for public lands, playgrounds, parks, parkways, or reservations so taken;

"(J) Designate the locations, and establish, limit and control such points of ingress to and egress from each turnpike project as are necessary or desirable in the judgment of the commission and of the director of highways to insure the proper operation and maintenance of such projects, and prohibit entrance to such project from any point not so designated, and, at its cost, at all points of ingress and egress, cause to be erected large and suitable signs, facing traffic from each direction on the toll road, which shall designate the number and other designations of all United States or state highways of ingress or egress, the

names of all Ohio municipal corporations with a population of five thousand or more within a distance of seventy-five miles on such roads of ingress or egress, and the distance in miles to such designated municipal corporations;

"* * *

"(O) Do all acts necessary or proper to carry out the powers expressly granted in Sections 5537.01 to 5537.23, inclusive, of the Revised Code."

Section 5537.01, Revised Code, is devoted to definitions, and subdivision B thereof recites:

" 'Project' or 'turnpike project' means any express highway, super highway or motor way constructed under Sections 5537.01 to 5537.23, inclusive, of the Revised Code, at such location as is approved by the Governor, including all bridges, tunnels, overpasses, underpasses, interchanges, entrance plazas, approaches, toll-houses, service stations, and administration, storage, and other buildings and facilities which the commission deems necessary for the operation of the project, together with all property, rights, easements, and interests which may be acquired by the commission for the construction or the operation of the project. Each project or turnpike project shall be separately designated, by name or number, and may be constructed or extended in such sections as the commission may from time to time determine."

Acting under the authority it no doubt deemed had been conferred on it by statute, the Turnpike Commission in its resolutions appropriating the lands in issue stated that among the rights and restrictions appropriated were:

"Second, all rights to erect on any of the aforesaid remaining lands any billboard, sign, notice, poster, or other advertising device which would be *visible* from the travelway of Ohio Turnpike Project No. 1, and which is not now upon said lands." (Emphasis supplied.)

Upon a reading of the above-quoted statutory provisions, the query immediately arising is whether the authority granted the Turnpike Commission is sufficiently broad to support the resolutions as they pertain to the erection and maintenance of billboards, signs, etc.

In the first paragraph of the syllabus in the case of *Pontiac Improvement Co. v. Board of Commissioners*, 104 Ohio St., 447, 135 N. E., 635, 23 A. L. R., 866, which paragraph was not disturbed or challenged in the later case of *State, ex rel. Bruestle, City Solicitor, v. Rich, Mayor*, 159 Ohio St., 13, 110 N. E. (2d), 778, this court held:

"The right of eminent domain belongs to the sovereign power, and statutes delegating authority to exercise it must be strictly construed. When it is sought to take the property of an individual under statutes granting such authority to corporations, subject to conditions specifically set forth, the protection of the constitutional guaranty of the right of private property requires that the powers granted by the Legislature be strictly pursued, and where the authority granted is to acquire a fee or lesser interest the term 'lesser interest' cannot be construed to mean authority to prescribe regulations from time to time as to the manner in which the property may be used or improved by the owner while he is in possession."

An examination of the statutes pertaining to the powers and functions of the Turnpike Commission, in conjunction with what is said in the first paragraph of the syllabus in the *Pontiac case*, convinces this court that no express authority was given the commission which enables it by appropriation proceedings to deny the owner of lands taken for the construction of a turnpike the right to use his remaining lands for the erection and maintenance of billboards, signs, notices, posters or other advertising devices.

Conceding, however, for the purposes of discussion, that existing statutory authority is sufficiently comprehensive to permit the Turnpike Commission to adopt and execute a resolution or resolutions which will result in the elimination of billboards, signs, etc., on lands not appropriated for actual turnpike construction, we are of the opinion that the adopted resolution quoted above is too indefinite and uncertain to be valid and enforceable. The word, "visible," standing alone is vague and ambiguous. What might be visible to one person might not be visible to another. No standard is set up whereby the word may be accorded prac-

tical meaning and effect. What approximate distance in feet or yards is involved?

True, Section 5537.23, Revised Code, states that the Turnpike Act, being necessary for the welfare of the state and its inhabitants, shall be liberally construed to effect the purposes thereof, but to what does such liberal construction extend? Undoubtedly, such liberal construction pertains to the establishment of turnpikes and their facilities, but we do not believe it can reasonably be said to comprehend the appropriation of lands and the uses thereof such as are here involved which are not necessary in the construction and operation of a turnpike proper.

In the interests of safety and to insure an uncluttered view of the landscape, the elimination of billboards and signs in proximity to a turnpike might be desirable, but existing legislative authority to permit such elimination is lacking. If specific authority should be forthcoming, we suppose further problems and further litigation might occur, but they are merely anticipatory and of no present concern.

The petition filed in the Ellis case raises other questions which should probably be noticed. Such petition alleges, one, a fatal defect in the appropriation resolution by its omission to set forth the necessity for appropriating Ellis' land, two, inability of the Turnpike Commission to proceed with the appropriation because it did not first submit to Ellis its plans for the construction of the turnpike through his property to enable him to calculate the damages he would sustain thereby, and, three, failure of the Turnpike Commission to negotiate with Ellis for a sufficient length of time as to the price to be paid him for his land before appropriation proceedings were begun.

As to the first proposition, the very adoption of the appropriation resolution indicates the necessity for the appropriation in the minds of the members of the Turnpike Commission, and the resolution is not fatally defective by omitting to state in terms that the appropriation is necessary. As to the remaining propositions, it is essentially within the discretion of the Turnpike Commission to deter-

mine whether sufficient preliminary negotiations have been had before appropriation proceedings are commenced, and certainly upon the trial of the appropriation case the landowner whose property is desired would be given ample opportunity to produce evidence as to the damages he will suffer by reason of the taking of his land and the manner of constructing the turnpike through it.

Because of the conclusion we have reached on the principal question presented in both the Ellis and Solether cases, the judgment of the Court of Appeals in the Ellis case is reversed and final judgment is rendered for Ellis to such an extent as will permit him to erect billboards, signs, etc., on his lands not taken for turnpike construction purposes, and in the Solether case the judgment of the Court of Appeals is affirmed, so far as it reverses the judgment of the trial court in sustaining the demurrer to the petition, but is reversed, so far as it remands the cause to the trial court for further proceedings, and the cause is remanded to the Court of Common Pleas, with instructions to enter judgment for Solether.

Judgments accordingly.

Weygandt, C. J., Middleton, Taft, Hart and Stewart, JJ., concur.

Lamneck, J., concurring. I concur in paragraphs one and three of the syllabus and in the judgments. However, I am of the opinion that existing statutory authority is sufficiently comprehensive to permit the Turnpike Commission to adopt a resolution, or resolutions, of appropriation which will eliminate billboards and other advertising media in close proximity to a turnpike, which tend to affect safety of travel on a turnpike. In the absence of specific legislative authority defining the authority of the Turnpike Commission relative thereto, the necessity of such appropriation must be clearly shown, and the appropriation resolution therefor must be confined to reasonable and definite territorial limits, and the advertising media, to be eliminated, must not include that which would not ordinarily distract the attention of a driver of a motor vehicle using a turnpike.

The appropriation resolutions in the instant cases are too indefinite and uncertain to be valid and enforceable.

JUDGMENT

THE SUPREME COURT OF THE STATE OF OHIO

The State of Ohio, January Term, A. D. 1954

City of Columbus— To wit: Wednesday, June 30, 1954

Appeal from the Court of Appeals of Lucas County

Cooley Ellis,
Plaintiff-Appellant,
vs.
Ohio Turnpike Commission,
Defendant-Appellee.

No. 33868

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this Court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that final judgment be, and the same hereby is, rendered in favor of said appellant to the extent as will permit him to erect billboards, signs, notices, posters or other advertising devices on his lands not taken for turnpike construction purposes.

It is further ordered and adjudged that appellant recover from appellee his costs expended in this Court in the Court of Appeals and in the Court of Common Pleas taxed at $.....

Ordered that a special mandate be sent to the Court of Appeals of Lucas County to carry this judgment into Execution.

I, Seba H. Miller, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the Journal of said Court.

Witness my hand and the seal of said Court this 7th day of July, 1954.

/s/ Seba H. Miller, Clerk
By /s/ Harold O. Shelton, Deputy.

(Seal)

APPLICATION FOR REHEARING

IN THE SUPREME COURT OF THE STATE OF OHIO

The State of Ohio on relation of Cooley Ellis, Plaintiff, vs. Honorable Joy Seth Hurd, Honorable Julius M. Kovachy, Honorable Lee E. Skeel, Sixth District Court of Appeals, Defendants.	No. 34594

Now comes the applicant, Cooley Ellis, Relator herein, and within fourteen (14) days from the decision of this Court, makes application to the Court for rehearing in the above indicated cause and a reopening of Cause No. 33868 for further consideration in this Court. This application is made for the reason that constitutional rights guaranteed to the landowner under the Constitution of the State of Ohio and the Fourteenth Amendment in the Constitution of the United States have been violated, as follows:

1) The decision reached by this Court on December 28, 1955 in the within cause must be reconsidered because in effect it finally destroys the right to a hearing

which the decision of this Court on June 30, 1953 in Cause No. 33868, set forth at page two of the petition herein, guaranteed to the landowner. In said Cause No. 33868 this Court considered the petition of the landowner seeking adjudication of various constitutional and procedural issues basic to the right of the Ohio Turnpike Commission to appropriate his land in the manner then being attempted. The cause coming before this Court on a demurrer by the Ohio Turnpike Commission to the petition for failure to state a cause of action, this Court reversed the Court of Appeals and remanded the cause for trial.

Any confusion that may exist in this Court and elsewhere surrounding the mandate of this Court as it applies to the petition of Ellis stems from the unfortunate consolidation of the cause with Solether v. Ohio Turnpike Commission, 162 O. S. 119. While both cases dealt with the attempted appropriation of sign rights on the remaining lands of the owners as part of the property to be appropriated, the Ellis case contained other causes of action that received no consideration whatsoever. For this reason it appears that the consolidation of the cases was improper, leaving at it did important matters undecided unless in fact the Court felt that the undecided questions should properly be heard and decided by the trial court. In either case Ellis has been denied the due process of a hearing on the matters concerned, because this Court did not consider them and the Court of Appeals refused to do so.

There is no question that certain matters contained in the petition were left open for decision in the lower court. The Court's attention is again directed to a letter, set forth at page three of the petition, written by Judge Zimmerman concerning the proposed form of the mandate dated June 30, 1953 in which he discusses other matters that might possibly be included by saying: "They should certainly be the subject of a judgment by the Court of Appeals before the Supreme Court may dispose of them."

The Court of Appeals of the Sixth District initially complied with the Supreme Court mandate by setting the case for trial. Then, erroneously or deliberately it granted leave of Court for the Ohio Turnpike Commission to file a special demurrer to the remainder of the petition. In the view of the landowner, this in effect was a demurrer to the mandate of this Court. Surely such unusual procedure was improper. If issue was to be taken with the mandate it should have been done in this Court. Proper procedure is clearly indicated again by Judge Zimmerman's letter, referred to above, wherein he says, in part: "and/or Mr. Harrington would have the opportunity to file an application for the correction of the entry in accordance with their ideas. Whether the Ohio Turnpike Commission will apply for a rehearing I do not know, but it would not surprise me if it did." Following the permission of the Court of Appeals allowing the filing of the special demurrer pleading of briefs were filed by both sides and the trial date set. On that day the Court of Appeals disqualified themselves and postponed the trial. The Eighth District Court of Appeals, sitting by designation, heard the cause, sustained the special demurrer and dismissed the petition of the landowner. Upon appeal by the landowner this Court, for reasons best known to itself, shut the door of justice by finding that there was no constitutional issue involved and refusing the motion to certify the record. The refusal of the Supreme Court to accept the appeal forced the landowner to file the petition for Writ of Procedendo asking the Court to enforce its mandate dated June 30, 1953, in Cause No. 33868. Any other course would place the Supreme Court in the difficult position of allowing an inferior court to destroy its mandate and deny a litigant constitutional rights which this Court had sought to establish.

The action of the Court of Appeals, in addition to being contrary to the spirit of the mandate of this Court, was invalid and void because it had no jurisdiction to entertain the case. Under the procedural law of Ohio as set forth in the brief in support of the petition hereinbefore filed,

the Court of Appeals was compelled to remand the case to the Common Pleas Court as the court of original jurisdiction for trial. *Hotel Burnet Co. v. Union Central Life Ins. Co.*, 72 O. A. 453 52 N. E. (2d) 754; *Thompson v. Moore*, 72 O. A. 539, 63 N. E. (2d) 666; *Lemaister v. Warner*, 142 O. S. 1, 50 N. E. (2d) 331. Again, it is mandatory that this Court reconsider its decision on the Procedendo because the action of the Court of Appeals, being void for want of jurisdiction, in fact does not exist and the mandate of this Court remains open and unfulfilled. The case rests squarely in the hands of this Court to *enforce its mandate.* There being no question of appeal involved or possible, the appropriate remedy is Writ of Procedendo.

The vice in the foregoing proceedings is that the appropriation proceedings which the petition of the landowner sought to examine were held and concluded prior to this Court's mandate of June 30, 1953 in Cause No. 33868. Even though this Court said in its action on June 30, 1953 that Ellis stated a cause of action for examination of the resolution of necessity and many phases of the appropriation activities of the Ohio Turnpike Commission Ellis's land, consisting of ninety-six (96) acres, has been confiscated without a hearing on said claims. This is a gross denial of the right of due process guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

2) The condemnation cases clearly were premature, should not have been tried. In fact, they should not even yet be tried until the claims of the landowner recognized by this Court in its mandate of June 30, 1953 are decided. Nor is this the only serious abuse of the power of eminent domain perpetrated by the Ohio Turnpike Commission and inadvertently supported by the courts in the course of the pell mell, cart before the horse approach of the Ohio Turnpike Commission. This Court has in its possession, in the brief in support of the petition herein filed, exhibits showing that the property sought to be appropriated was not fully determined until September 3, 1953, but that resolutions of necessity were adopted by the Ohio Turnpike Com-

mission at a meeting held on September 1, 1953. Said resolutions recite that the Commission had endeavored, for a reasonable time, to negotiate with the owner as to the compensation to be paid therefor. It is thus patently impossible for the Ohio Turnpike Commission to have effectively negotiated with the landowner prior to the institution of appropriation proceedings because you cannot negotiate for the purchase of an item until you know what it is. The Ohio Turnpike Act specifically provides for an endeavor to agree with the owners as to the compensation to be paid for the property taken as a specific condition precedent to appropriation court proceedings. Such negotiation is likewise an *integral part of the due process of law to which a property owner is entitled.* Ellis has raised the issue in his petition in Cause No. 33868 and again in support of his petition herein but has constantly been denied his right to a determination of the issue of fact.

3) Ellis has further raised, and been blocked from hearing on, the issue of the necessity for the instant taking of his lands. The Ohio Turnpike requires sixteen (16) acres for building the roadway. By arbitrary selection of the right of way to be taken the Ohio Turnpike Commission has physically destroyed fifty-three (53) acres out of total holdings of ninety-six (96) acres by wanton destruction of ingress, egress and utilities. By capricious *taking* of *all* abutters' rights in the remaining lands instead of *prohibiting* future interference by Ellis with the turnpike (which would have been sufficient to the purpose) the Ohio Turnpike Commission has effectively confiscated the balance of Ellis's ninety-six (96) acres as well. Further, the function of the Turnpike Commission is to build a roadway. For this purpose an easement is sufficient taking and acquiring of unqualified fee estate is unnecessary and therefore excessive. Such excessive appropriation is equivalent to the taking of property for other than public purposes and this abuse of the landowner is in patent violation of the Ohio Turnpike Act, the Constitution of the State of Ohio and the due process safeguards of the Fourteenth Amendment of the Constitution of the United States.

4) Even in the description of the property to be taken by appropriation for the roadway, the Ohio Turnpike Commission has utterly destroyed the requirements of due process of law which the landowner is, by constitutional right, entitled. There is no way to fix its location to existing monuments of record.

The Commission attempted to appropriate sign rights in the landowner's remaining land which are presently in such a nebulous condition that no one knows who owns what. As hereinbefore pointed out this condition is in part the result of the unfortunate consolidation of the Ellis case with the Solether case. Regardless of the cause, this Court's opinion and mandate say that the Ohio Turnpike Commission cannot prohibit the landowner from erecting signs on his remaining lands but do not deny the Ohio Turnpike Commission the right to sign rights. The condemnation decree and deeds executed pursuant thereto still contain sign rights appropriated by the State of Ohio. Literally, the record gives both parties the right to erect signs. Surely the reopening of this case is necessary to correct this intolerable situation.

The Turnpike Commission appropriated what is known as "abutters' rights" in the landowner's remaining property. These abutters' rights are so vague and indefinite as to defy precise definition on the basis of any legislative or judicial action to date, with the inevitable result that the landowner's use of his remaining lands is not only abridged but completely destroyed until such time as the precise extent of his ownership in the remaining lands is made certain. As a practical matter, the Ohio Turnpike Commission has taken all of Ellis' ninety-six (96) acres.

This continuing damage to the landowner repeats and increases day by day, sterilizing valuable and useful land because of the callous disregard for the constitutional right of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. This situation exists despite the fact that the Supreme Court has already characterized the resolution of necessity set

forth in the within cases as being too vague and indefinite to be valid. How, other than by reopening of this cause, can the foregoing situation be corrected?

As a necessary consequence of the careless and autocratic approach of the Ohio Turnpike Commission to the question of property to be taken, no one, least of all the jury in the condemnation proceedings herein complained of, understood what was the taking of a property right and what was damage to the remaining land. A proper finding would have required four distinct awards; one for land taken, one for sign rights taken, one for abutters' rights taken and one for damage to the residue of the land. The jury in fact returned two findings; one for property taken and one for damage to the residue. These considerations are basic to proper computation of federal income tax to be paid by the landowner. Unless a hearing is had upon the petition filed by the landowner and before this Court in Cause No. 33868 to insure proper condemnation proceedings this Court will have aided and abetted the Ohio Turnpike Commission in denying the United States Government its rightful share of income tax. The reasons are as follows: All of the items of property set forth in the resolution of necessity in the appropriation proceedings against this landowner represent property to be bought. The Ohio Turnpike Commission, pursuant to the erroneous jury finding, is endeavoring to pay a sum called damages for the easements of sign and abutters' rights in the residue of the property when in fact it was an outright purchase price for a property interest bought. Moneys received by the landowner for property interest bought must be included in the award as such if the United States Government is to receive its proper tax, there being no tax due on sums assigned to damage to residue as was done in the condemnation proceedings of the Ellis cases and, no doubt, in other property condemned or purchased.

5) All authorities, from text writer to court decision, emphasize that in the very harsh atmosphere of appropriation proceedings it is the duty of the court, both parties and their counsel to protect the landowner to the extent

that his full rights are respected. The inexcusable conclusion to be drawn from the record in this case is that the exact opposite result has been achieved. As error after error accumulated, committed by the Ohio Turnpike Commission, counsel for same and the courts themselves, the Ohio Turnpike Commission, a $326 million dollar private corporation contrived to devote all its funds, energies, personnel and favored position to maneuver around all rights of the landowner. On the question of evidence of cost and sale price of the property to the landowner, which many states exclude from condemnation proceedings by law and which the American Institute of Appraisers forbids from all determination of value by its members, the Turnpike Commission camouflaged, exploited and publicized this single factor so far out of proportion that it found its way into the opinion of this court in the condemnation proceedings themselves in the form of the only item of evidence of value vouchsafe specific reference. It is, under the circumstances of camouflage and pressure outlined above, easy to understand how very basic issues could be so buried as to never see the light of day. Unfortunately, these circumstances do not render these oversights any less damaging to the landowner or any less in violation of basic constitutional rights.

As it stands today, the State of Ohio is the absolute owner of the right of way, abutters' rights and to some unknown extent, sign rights. By virtue of the unknown extent of the abutters' rights in particular, the State of Ohio, by its Turnpike Commission, has totally destroyed the quiet use and enjoyment of all of the landowner's remaining lands. Even the form of the finding in the condemnation cases as to property taken and damage to the residue is so imperfectly made up that neither this landowner nor any other in similar circumstances can properly compute the taxes rightfully due the United States Government. If matters are allowed to stand as they are today, this Court will have been a party to a flagrant abuse of the due process of law guaranteed the landowner by the Constitution of the United States of America. Such a

result is unthinkable and can only result from misunderstanding of facts.

For the foregoing reasons, the applicant prays the Court for a rehearing of the within cause in order that matters may be put right and old-fashioned law and order restored to the State of Ohio.

.....

Counsel.

STATEMENT OF SERVICE

Copy of the foregoing application for rehearing was served upon Messrs. Fuller, Harrington, Seney & Henry this 11th day of January, 1956.

Written notice of the filing of the foregoing application for rehearing was served upon the Reporter of the Supreme Court by regular mail this 10th day of January, 1956.

.....

ORDER SUSTAINING DEMURRER AND DISMISSING PETITION

THE STATE, EX REL. ELLIS,
v.
HURD, ET AL., JUDGES

Procedendo—To compel Court of Appeals to strike from record—To dismiss causes from this court—To stay proceedings — Petition demurrable — Procedendo not substitute for review.

(No. 34594—Decided December 28, 1955.)

In Procedendo.

Mr. Douglas L. Winter, for relator.

Messrs. Fuller, Harrington, Seney & Henry, for respondents.

Per Curiam. Cooley Ellis, relator. brings in this court an action in procedendo against respondents, Joy Seth Hurd, Julius M. Kovachy and Lee E. Skeel, judges of the Eighth District Court of Appeals sitting by designation on the Sixth District Court of Appeals, to require them to strike from the record all proceedings in the case of *Ellis v. Ohio Turnpike Commission*, No. 177995 in the Court of Common Pleas, No. 4757 in the Court of Appeals, and No. 33868 in the Supreme Court, subsequent to the issuance of the mandate of this court, dated June 10, 1954 (See 162 Ohio St., 86, 120 N. E. [2d], 719), and to remand such cause without delay to the Court of Common Pleas of Lucas County for trial upon its merits.

The petition prays further that causes Nos. 34430 and 34431 in this court and entitled *Ohio Turnpike Commission v. Ellis* be dismissed, and that the judgments rendered therein be stricken from the record; that property of the relator taken by the Ohio Turnpike Commission be returned to him; and that all matters relating to the appropriation of relator's land by the Ohio Turnpike Commission be stayed until the trial and disposition of cause numbered 177995 in the Court of Common Pleas of Lucas County.

A demurrer to the petition has been interposed upon the ground that such petition does not state facts which show a cause of action.

The relator asserts that the prayer of his petition should be granted to enable him to raise and litigate issues embracing the constitutionality of the Turnpike Act, the propriety of taking abutter's rights and other property rights in addition to a right of way, the necessity for the taking of his property, and other related questions.

In the opinion of this court the demurrer is well taken.

Some of the matters to which the relator refers have already been litigated and finally disposed of; others might perhaps be the subject of further litigation in an action or actions initiated in the Court of Common Pleas having jurisdiction.

An action is procedendo in this court to accomplish the objects described is not appropriate or maintainable. It is well established that such an action "cannot be made the instrumentality of review." *State, ex rel. Barner, v. Marsh, Clerk of Courts,* 120 Ohio St., 222, 224, 165 N. E., 843.

The demurrer to the petition is sustained, and the petition is dismissed.

Demurrer sustained and petition dismissed.

Weygandt, C. J., Matthias, Hart, Zimmerman, Stewart, Bell and Taft, JJ., concur.

JOURNAL ENTRIES

THE SUPREME COURT OF OHIO

The State of Ohio on relation of Cooley Ellis, *Relator,* v. Honorable Joy Seth Hurd, Honorable Julius M. Kovachy, Honorable Lee E. Skeel, Sixth District Court of Appeals, *Respondents.*	Case No. 34594.

JOURNAL ENTRIES

Wednesday, December 28, 1955

Journal No. 41, Page 656
In Procedendo:

This cause came on to be heard upon the demurrer of respondents to the petition in procedendo and was argued by counsel.

On consideration whereof it is ordered and adjudged that said demurrer be, and the same hereby is, sustained for

the reasons stated in the opinion rendered in this case and relator not desiring to further plead it is therefore ordered and adjudged that the writ of procedendo prayed for be, and the same hereby is, denied and the petition is dismissed.

It is further ordered and adjudged that the relator pay the costs herein, taxed at $..... for which execution is awarded.

Wednesday, January 25, 1956

Journal No. 41, page 677
Rehearing Docket:

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

APPENDIX E

No. 177840.

COMMON PLEAS COURT, LUCAS COUNTY, OHIO.

MATTER OF APPROPRIATION BY OHIO TURNPIKE COMMISSION OF PROPERTY OF COOLEY ELLIS, ET AL.

APPLICATION FOR ASSESSMENT OF COMPENSATION

(Filed in Common Pleas Court September 10, 1953.)

Under authority of G. C. Sec. 1201-1222 and pursuant to G. C. Sec. 1208, Ohio Turnpike Commission hereby applies for the assessment of compensation for the appropriation of the property described in the Commission's Resolution No. 403-1953, a copy of which is hereto attached and made a part hereof.

Fuller, Harrington, Seney & Henry,
Trial Counsel.

Of Counsel:
Frank C. Dunbar, Jr.,
General Counsel.

James L. Stegmeier,
Staff Attorney,
Ohio Turnpike Commission.

OTC Parcel No. 51-B
51-C
51-C(1)

OHIO TURNPIKE COMMISSION

Resolution No. 403-1953 Declaring the Necessity of Appropriating Property and Directing that Proceedings to Affect Such Appropriation be Begun and Prosecuted.

Resolved that the Commission has endeavored for a reasonable time to agree with the owner or owners of the property described herein as to the compensation to be paid therefor, but has been unable to agree with said owner or owners, and said property is needed for the construction and efficient operation of the Ohio Turnpike Project No. 1, and

Be It Further Resolved that proceedings be begun and prosecuted to effect the appropriation of the following-described property, and the easements, rights, and restrictions hereinafter described, from the following-named owner or owners and persons having interests therein, to-wit:

Owner(s)	Place of Residence
Cooley Ellis,	3635 Talmadge Road, Toledo, Ohio;
Mary Ellis,	3635 Talmadge Road, Toledo, Ohio;
Ruth E. Slater, formerly Ruth E. Ellis,	Lakeland, Michigan;
Joel S. Rhinefort,	3866 Brookside Road, Toledo, Ohio;
Nolan Boggs, Howard W. Boggs, and Ralph Boggs, doing business as Boggs, Boggs, and Boggs, a partnership,	828 Nicholas Bldg., Toledo, Ohio;
John F. Kumler,	3615 River Road, Toledo, Ohio;
The unknown heirs, devisees, and assigns of Frederick A. Kumler, deceased,	Address Unknown;
County Auditor of Lucas County,	Lucas County Court House, Toledo, Ohio;
County Treasurer of Lucas County,	Lucas County Court House, Toledo, Ohio.

The aforementioned property to be appropriated is described as follows:

Parcel No. 51-B—Fee Simple.

Situated in the City of Maumee, County of Lucas and State of Ohio and known as being part of Lots Nos. 39, 40, 41 and 47 in Sylvan Park as shown by plat recorded in Volume 6, page 18 of Lucas County Map Records and part of Private Grant 581 in Town 3, United States Reserve of 12 miles square at the foot of the rapids of the Miami of Lake Erie, and bounded and described as follows:

Beginning in Southerly line of land conveyed to the City of Toledo by deeds dated May 1, 1931 and recorded in Volume 858, page 75 of Lucas County Deed Records at its intersection with a line parallel to the center line of Ohio Turnpike Project No. 1, as shown by plat recorded in Volume 50, page 20 of Lucas County Map Records and distant Northeasterly there from 160.00 feet, measured on a line normal to said center line; thence Northwesterly along said parallel line to the Northwesterly line of land conveyed to the City of Toledo as aforesaid; thence Southwesterly along said Northwesterly line to its intersection with a line parallel to said center line and distant Southwesterly there from 160.00 feet, measured on a line normal to said center line; thence Southeasterly along said parallel line to the Southerly line of land conveyed to the City of Toledo as aforesaid; thence Easterly along said Southerly line to the place of beginning.

Parcel No. 51-C—Fee Simple.

Situated in the City of Maumee, County of Lucas and State of Ohio and known as being part of Private Grants Nos. Five hundred eighty (580) and Five hundred eighty-one (581) in the United States Reserve of twelve (12) miles square at the foot of the rapids of the Miami of Lake Erie and bounded and described as follows:

Beginning in the Southeasterly line of Detroit Avenue as now established at its intersection with a line parallel to the center line of Ohio Turnpike Project No. 1, as shown by plat recorded in Volume 50, page 20 of Lucas County Map Records and distant Southwesterly therefrom 160.00 feet measured on a line normal to said center line; thence Southeasterly along said parallel line to the Northwesterly line of land conveyed to the City of Toledo by deed dated May 1, 1931 and recorded in Volume 858, page 75 of Lucas County Deed Records; thence Northeasterly along said Northwesterly line to its intersection with a line parallel to said center line and distant Northeasterly therefrom 160.00 feet, measured on a line normal to said center line; thence Northwesterly along said parallel line to the Southeasterly line of the abandoned Miami and Erie Canal; thence Southwesterly along said Southwesterly line to the Southeasterly line of Detroit Avenue; thence Southwesterly along said Southeasterly line of Detroit Avenue to the place of beginning.

Parcel No. 51-C(1)—Permanent Easement for Water-Line Purposes.

Situated in the City of Maumee, County of Lucas and State of Ohio and known as being part of Private Grant No. 581 in the United States Reserve of Twelve (12) Miles Square at the foot of the Rapids of the Miami of Lake Erie and being bounded and described as follows:

Beginning on a line parallel to and distant 160 feet Northeasterly of, measured on a line normal to, the center line of Ohio Turnpike Project No. 1, as shown by plat recorded in Volume 50, Page 20 of Lucas County Map Records at its intersection with the Southeasterly line of the abandoned Miami and Erie Canal; thence Southeasterly along said parallel line to a point normal to said center line of Ohio Turnpike Project No. 1 at Station 740+15; thence Northerly to a point distant 70 feet Southeasterly, measured at right angles, from a point on the center line of Anthony Wayne Trail, distant 304 feet Northeasterly, measured along said center line, from its intersection with

the center line of Ohio Turnpike Project No. 1; thence Southwesterly in a direct line to the place of beginning.

The aforementioned rights and restrictions to be appropriated are as follows:

First: Any and all abutters' rights, including access rights, appurtenant to any remaining portion of the lands of said owner or owners of which the real estate shall have formed a part prior hereto, in, over, or to the parcels taken, including such rights to any turnpike constructed thereon.

All rights to erect on any of the remaining lands of the appellant any billboard, sign, notice, poster, or other advertising device which would be visible from the travelway of Ohio Turnpike Project No. 1, and which is not now upon said lands.

I Hereby Certify that the foregoing is a true and correct copy of a resolution adopted by the Ohio Turnpike Commission at a meeting duly called for and held on Sept. 1, 1953.

John Soller,
Assistant Secretary-Treasurer

(Seal)

No. 177,828.

COMMON PLEAS COURT, LUCAS COUNTY, OHIO.

MATTER OF APPROPRIATION BY OHIO TURNPIKE COMMISSION OF PROPERTY OF COOLEY ELLIS, ET AL.

APPLICATION FOR ASSESSMENT OF COMPENSATION

(Filed in Common Pleas Court September 4, 1953.)

Under authority of G. C. Sec. 1201-1222 and pursuant to G. C. Sec. 1208, Ohio Turnpike Commission hereby applies for the assessment of compensation for the appropriation of the property described in the Commission's Resolution No. 404-1953, a copy of which is hereto attached and made a part hereof.

Fuller, Harrington, Seney & Henry,
Trial Counsel.

Of Counsel:
Frank C. Dunbar, Jr.,
General Counsel,

James L. Stegmeier,
Staff Attorney,
Ohio Turnpike Commission.

OTC Parcel No. 51-G
51-G(1)

Notice and Request to Parties.

The foregoing writing is a copy of an application filed in the above-named court on September 4, 1953.

All notices, briefs, and other papers should be served upon the Commission's trial counsel named above. It will be very much appreciated if all papers be furnished in duplicate.

OHIO TURNPIKE COMMISSION

Resolution No. 404—1953 Declaring the Necessity of Appropriating Property and Directing that Proceedings to Effect Such Appropriation be Begun and Prosecuted.

Resolved that the Commission has endeavored for a reasonable time to agree with the owner or owners of the property described herein as to the compensation to be paid therefor, but has been unable to agree with said owner or owners, and said property is needed for the construction and efficient operation of the Ohio Turnpike Project No. 1, and

Be It Further Resolved that proceedings be begun and prosecuted to effect the appropriation of the following-described property, and the easements, rights, and restrictions hereinafter described, from the following-named owner or owners and persons having interests therein, to-wit:

Owner(s) Place of Residence

Cooley Ellis, 3635 Talmadge Road, Toledo, Ohio;
Mary Ellis, 3635 Talmadge Road, Toledo, Ohio;
Ruth E. Slater, formerly Ruth E. Ellis, Lakeland, Michigan;
Joel S. Rhinefort, 3866 Brookside Road, Toledo, Ohio;
Nolan Boggs, Howard W. Boggs, and Ralph Boggs, doing business as Boggs, Boggs, and Boggs, a partnership, 828 Nicholas Bldg., Toledo, Ohio;

County Auditor of Lucas County, Lucas County Court House, Toledo, Ohio;
County Treasurer of Lucas County, Lucas County Court House, Toledo, Ohio.

The aforementioned property to be appropriated is described as follows:

Parcel No. 51-G—Fee Simple.

Situated in the City of Toledo, County of Lucas and State of Ohio and known as being part of Private Grant No. 580 in the United States Reserve and being all that part of the lands described in the deed to Cooley Ellis, dated January 29, 1948 and recorded in Volume 1291, page 221 of Lucas County Deed Records lying within a strip of land 300 feet wide between parallel lines, the Northeasterly line of said strip being parallel to and distant 150 feet Northeasterly, measured on a line normal to, the center line of Ohio Turnpike Project No. 1, as shown by plat recorded in Volume 50, page 18 of Lucas County Map Records, and the Southwesterly line of said strip being parallel to and distant 150 feet Southwesterly, measured on a line normal to said center line.

Parcel No. 51-G(1)—Permanent Easement for Highway Purposes.

Situated in the City of Toledo, County of Lucas and State of Ohio and known as being part of Private Grant No. 5800 in the United States Reserve and being all that part of the lands described in the deed to Cooley Ellis, dated January 29, 1948 and recorded in Volume 1291, page 221 of Lucas County Deed Records:

Beginning on the Northeasterly line of Ogontz Subdivision as shown by the recorded plat in Volume 21 of Maps, page 27 of Lucas County Records at its intersection with a line being parallel to and distant 150 feet Northeasterly, measured on a line normal to the center line of Ohio Turnpike Project No. 1, as shown by the recorded plat in Volume 50 of Maps, page 18 of Lucas County Rec-

ords; thence Southeasterly along said parallel line to a point on a line drawn radially Southeasterly from Station 2+34.38 on line A (said line A being described as follows:—Beginning on the center line of Ohio Turnpike Project No. 1 as aforesaid at Station 720+17.72; thence Northeasterly along a line forming an angle of 49° 50′ 23″ in the Easterly quadrant 232.31 feet to a point of curvature; thence along a line curving to the right forming a central angle of 13° 16′ 40″ and a radius of 716.20 feet to a point of tangency; thence Northeasterly on a line tangent to said curve 157.31 feet to a point of curvature; thence along a line curving to the left forming a central angle of 13° 45′ 00″ and a radius of 716.20 feet to a point on the Southwesterly line of the Replat of Vanderbilt Terrace, an Addition recorded in Volume 46 of Maps, page 64 of Lucas County Records); thence Northeasterly along a line parallel to and distant 45 feet Southeasterly, measured on a line normal to line A as aforesaid to a point distant 45 feet Southeasterly, measured on a line normal to line A as aforesaid at Station 4+50; thence Northwesterly along said normal line to 10 feet; thence Northeasterly along a line parallel to and distant 35 feet Southeasterly, measured on a line normal to line A as aforesaid to a point distant 35 feet Southeasterly, measured on a line normal to line A as aforesaid, to a point distant 35 feet Southeasterly, measured on a line normal to the center line of line A as aforesaid at Station 6+50; thence Northwesterly along said normal line 5 feet; thence Northeasterly along a line parallel to and distant 30 feet Southeasterly, measured on a line normal to line A as aforesaid to a point on the Southwesterly line of the Replat of Vanderbilt Terrace as aforesaid; thence Northwesterly along said Southwesterly line 60 feet; thence Southwesterly along a line parallel to and distant 30 feet Northwesterly, measured on a line normal to line A as aforesaid to a point distant 30 feet Northwesterly, measured on a line normal to line A as aforesaid at Station 6+50; thence Northwesterly along said normal line 5 feet; thence Southwesterly along a line parallel to and distant 35 feet Northwesterly, measured on a line normal to line A as aforesaid to a point distant 35 feet North-

westerly measured on a line normal to line A as aforesaid at Station 4+50; thence Northwesterly along said normal line 5 feet; thence Southwesterly along a line parallel to and distant 40 feet Northwesterly, measured on a line normal to line A as aforesaid to a point distant 40 feet Northwesterly, measured on a line normal to line A as aforesaid at Station 3+50; thence Northwesterly along said normal line 10 feet; thence Southwesterly along a line parallel to and distant 50 feet Northwesterly, measured on a line normal to line A as aforesaid to a point distant 50 feet Northwesterly, measured on a line normal to line A as aforesaid at Station 2+45; thence Northwesterly along a line drawn from a point distant 50 feet Northwesterly, measured on a line normal to line A as aforesaid at Station 2+45 to a point distant 180 feet Northeasterly, measured on a line normal to the center line of Ohio Turnpike Project No. 1 as aforesaid at Station 716+50 to the Northeasterly line of Ogontz Subdivision as aforesaid; thence Southeasterly along said Northeasterly line to the place of beginning.

The aforementioned rights and restrictions to be appropriated are as follows:

First: Any and all abutters' rights, including access rights, appurtenant to any remaining portion of the lands of said owner or owners of which the described real estate shall have formed a part prior hereto, in, over, or to the parcel described above as Parcel No. 51-G, including such rights to any turnpike constructed thereon.

Second: All rights to erect on any of the aforesaid remaining lands any billboard, sign, notice, poster, or other advertising device which would be visible from the travelway of Ohio Turnpike Project No. 1, and which is not now upon said lands

I Hereby Certify that the foregoing is a true and correct copy of a resolution adopted by the Ohio Turnpike Commission at a meeting duly called for and held on Sept. 1, 1953.

John Soller,
Assistant Secretary-Treasurer.

APPENDIX F

APPLICATION FOR REHEARING

IN THE SUPREME COURT OF THE STATE OF OHIO

In the Matter of Appropriation by Ohio Turnpike Commission of property of Cooley Ellis, et al.	Cause No. 34430 34431

APPLICATION FOR REHEARING

Now comes the appellee, Cooley Ellis, and, within fourteen (14) days from the date of announcement of the decisions of this Court, makes application for a rehearing for the following reasons:

Upon rehearing, if this Court decides the cases are properly before it, then the existence of the following constitutional questions are admitted. Decisions on the constitutional questions are in order and must be determined by this Court.

1) The proceedings herein have been had under the Ohio Turnpike Act (Revised Code 5537.01-5537.99). The right of eminent domain is vested in the legislative authority by constitutional provision and can be delegated only to the extent that administrative details may be carried out with expediency. The Ohio Turnpike Act attempts to delegate the determination of whether or not the power of eminent domain shall be exercised, as well as the selection of turnpike routes and projects to be initiated thereunder, *to a board appointed by the Governor.* This amounts to unconstitutional delegation of the power of eminent domain under the Constitution of the State of Ohio, Article II, Section I, and United States of America, Article I, Section I, and is an infringement of the constitutional guarantees of a republican form of government as provided in Article IV, Section IV, United States Constitution.

The defect here set forth goes to the validity of the entire action and no proceeding had thereunder can be purged of the vice. Therefore the subject condemnation proceedings are of necessity destroyed.

2) The subject proceedings appropriated "any and all abutters' rights, including access rights, appurtenant to any remaining portion of the lands of said owner or owners of which the above described real estate shall have formed a part prior hereto in, over or to the parcels described as * * * including such rights to any turnpike constructed thereon". It at once appears that this represents a taking of property so vague and indefinite in description as to constitute a violation of the due process of law guaranteed the property owner by the Fourteenth Amendment of the United States Constitution. This contention corresponds to the ruling of this Court in Cause No. 33868, *Ellis v. Ohio Turnpike Commission,* 162 O. S. 86, with regard to sign rights appropriated.

The taking of abutters' rights in the form indicated above also, in the instant case, appropriated all possible means of ingress and egress to portions of the property owner's remaining lands. This was unnecessary and constitutes the taking of property without due process of law.

Further constitutional objection to the appropriation of abutters' rights in the form here attempted arises from the far reaching nature of the property right taken. Because the true extent of the landowner's remaining interest is unknown, the land cannot be used for any constructive purpose and in effect all of Ellis's ninety-six (96) acres have been taken. This is clearly excessive, and a violation of the due process of law which is required by the Fourteenth Amendment to the Constitution of the United States of America.

3) The appropriation in eminent domain is limited to property necessary for public use. Land appropriated here for turnpike purposes is being devoted to gasoline stations, stores, hotels, restaurants, and similar private enterprises. These services are made available to the general public who are non users of the turnpike through special access roads.

By virtue of regulations provided for the bond issue, this competition with private business by unwarranted extension of the use of condemned land can fall into the direct control of the bondholders to their personal profit.

In effect, the power of eminent domain has been exercised for other than a public purpose in violation of the constitution of the State of Ohio and the United States of America. Further, the taking of sufficient lands to accommodate these unlawful uses is excessive and a violation of the due process of law guaranteed the landowner by constitutional provision.

4) The Ohio Turnpike Commission as condemnor seized possession of the land allegedly taken immediately upon deposit of the jury award into court. Appeal of the condemnation proceedings was carried forward and disregarded. Other litigation attacking the right of the condemnor to the property was pending. Regardless of the outcome of said litigation, the property was mutilated by works created thereon so as to be useless. This was done under color of right granted by the Ohio Turnpike Act.

This premature taking of the land *before* the right to do so was established fails utterly to give the landowner the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

5) The Ohio Turnpike Act limits the possible appeal in cases arising thereunder to an appeal to the Court of Appeals (Revised Code 5537.06 (n)). Here, the Court of Appeals reversed the trial court and remanded the causes for new trial. This is the final law on the case and destroys the award utterly. This Court being without jurisdiction by terms of the Act to entertain the cause, its action is a nullity. The attempted exercise of jurisdiction which does not exist is a violation of due process of law. The continued taking of the property by the Ohio Turnpike Commission after the award falls becomes bald confiscation and a flagrant denial of due process of law.

Under the constitution of Ohio and case law of the state, the remand of the Court of Appeals in these matters does not constitute a final order and is therefore not appealable to this Court. This subject was argued to this Court on the hearing of the motion to certify and is preserved in written form in the briefs of the landowner on the merits therein. This issue also goes to the jurisdiction of this Court.

Due process of law for the landowner was denied by exercise of jurisdiction in the subject cases by this Court because no question of great general or public interest was in fact presented. The issues presented by the appeal amounted to nothing more than application of existing rules of evidence, etc. to the instant facts. The issues were of interest or importance to the litigants only. The jurisdiction of this Court is limited here by the Constitution of the State of Ohio, Article IV, Section VI, and to exceed the same constitutes a denial of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

Lastly, the decision of this Court, like the decisions of the trial court and Court of Appeals before it, was a void nullity for the reason that no court has jurisdiction to consider the condemnation proceedings until related matters of defense raised by action in equity have been heard and determined. Otherwise, no just assessment of the damage to the landowner is possible. Such issues were in fact raised by the landowner in a separate action which was considered by this Court on demurrer of defendant under Cause No. 33868, *Ohio Turnpike Commission v. Ellis*, 162 O. S. 86. The mandate of this Court issued therein on June 30, 1953 remanded all issues save one (sign rights appropriated) back to the trial court for hearing. This necessarily invalidated proceeding had in these condemnation proceedings. These matters of defense still have not been heard and decided. Any taking of the owner's property before this has been done is a denial of due process of law under the Fourteenth Amendment to the Constitution of the United States.

6) Further denial of due process of law as to the landowner is to be found in the consideration given to the issues presented in this court, independent of any other errors therein. Findings of fact on key issues recited in the opinion simply are not substantiated by the record. The only reasonable assumption is that the court has been misled or confused by the maneuverings of the Ohio Turnpike Commission into mistaken beliefs as to the facts. Such faulty consideration of the case is positive denial of the constitutional guarantee of due process of law.

Commenting further on the record as contained in this Court's opinion herein, even if the proceedings were otherwise valid the disregard of the prejudicial errors which admittedly are present in the history of the cases is error which deprives the landowner of his constitutional privilege of due process of law.

7) It is respectfully submitted that due process of law has been denied the landowner because judicial discretion has been repeatedly abused to the prejudice of the owner. While the surface record may indicate a full day in court, yet due process of law requires that the landowner receive *just* compensation and his damage be *fairly* assessed. In other words, the substance of the record is basic to due process of law.

This Court, in overruling the Court of Appeals has declared that a fair result was achieved despite admitted errors along the way. The landowner respectfully submits that this is not true. This Court has plainly been deceived by the external appearance of the "voluminous record" amassed in this matter. The necessary inference to be drawn from the entire record, as well as the individual errors considered and admitted as such by this Court, is that the landowner has not had due process of law assured him by the Fourteenth Amendment to the Constitution of the United States and further that substantial justice has not been done.

A brief reference to some of the matters referred to in the opinion of this Court will suffice to indicate the prejudicial and pernicious pattern into which matters have

fallen. Admission of evidence has been left entirely in the discretion of the trial court. In the words of this Court in paragraph two of the syllabus in this case:

> "2. In such a proceeding, the admission and exclusion of evidence as to the value of the land and other related subjects rest to a large extent in the discretion of the trial court, and, where it is apparent that such court did not abuse its discretion in these respects and that no prejudicial error has intervened, a reviewing court will not interfere."

In the trial court Ellis was denied the right to testify as an expert because his knowledge came from others. Ohio Turnpike Commission's witness Schenck was allowed to testify as to value even though he himself admitted that his sole basis for value was transfer tax stamps attached by others to deeds covering sales of other properties allegedly comparable which might or might not reflect the actual total sale price thereof. In fact all of his information also came from others as indicated by his testimony on direct examination at page 616 of the record in Court of Appeals No. 4777 (S. C. No. 34430), as follows:

> "* * * I also consulted the Chamber of Commerce for authentic information. I also consulted the Planning Commission, the Planning Commission of Toledo. I talked to the School Board Superintendent, the County Superintendent, and the Superintendent of Maumee. I went to the Court House and secured maps, and I talked to the Engineer's Office. I visited the County Auditor's Office, and did everything that was possible to, before I attempted to establish a value—was to get all the facts and the authentic information that would be necessary and would have an influence upon the particular uses of this property and what values it may have.
>
> Q. Now, with reference to market prices in Toledo, prices at which property had been selling, did you make any investigation (617) as to that? A. Yes I did.

> Q. Tell us what you did in that regard. A. I checked the sale value through the sales stamps on deeds, on some adjoining property, land, and others in the adjoining,—but what would be comparable to a tract of land of this size and their locations."

Broad as judicial discretion may be in this question, certainly it is abused when the rule for one party is not applied equally to the other.

Witness Welch for the landowner was the best qualified of all the witnesses for either side to evaluate land with the special adaptabilities of the premises in question. He was prevented from testifying as to value because he had limited knowledge of value of real estate in the Toledo area. Witness Schenck was allowed to testify on value although he had *never* dealt in Toledo area property except to appraise one parcel ten (10) years previous to the instant case. Once again, the broadest discretion in the trial court is patently abused if exercised differently as to different parties in the same action. Rulings such as the foregoing might all be defensible individually if rendered in different cases. However, when concurring in the same matter, they exemplify the impossibility of fair trial and due process within the Fourteenth Amendment of the United States Constitution.

Was the eventual result fair despite the errors committed? A preoccupation with original price paid by the landowner five or six years before, which is at best only one factor to be considered, pervades the record even to the opinion rendered by this Court. Really effective evidence of increments in costs and value by way of additional expense, exhibits, and the testimony of witness Welch was denied admission on behalf of the landowner. A purported statement of value made by the landowner in form of financial statement (denied by landowner) given to counsel for his estranged wife was admitted as evidence of *value* even though the witness Openlander conceded that even he understood the statement as to the subject property to represent *cost* only and had been so made and represented. What was at best evidence of cost was incurably driven home to

the jury as to the landowner's opinion of value. This theme was so predominant as to bring one juror to the announced conclusion that "* * * it's just for the jury to decide how much was paid for the property to begin with, and whether or not Mr. Ellis was trying to profiteer." Even if this misconduct of the juryman will not require a new trial, it most conclusively documents the prejudicial effect of the above described pattern.

What was the end result? Even this Court in its opinion compared the awards with cost per acre to the landowner some five or six years before the taking without so much as allowance for other monies expended thereon and concluded that Ellis had received fair if not liberal treatment on the money award.

In fact, in what was from beginning to end the most vigorous kind of adversary proceeding, the jury returned awards substantially below the value even as appraised by three of the witnesses for the Ohio Turnpike Commission, and approach none of the values set by witnesses for the owner.

In fact, when the landowner first heard that the proposed turnpike route would bisect and destroy the exceptional value of both his parcels of land, he advised the Commission by registered mail that the proposed route would cut property valued far in excess of One Million Dollars ($1,000,000.00).

In fact, on July 13, 1953, when this Ellis plea was ignored, he offered to pay the Ohio Turnpike Commission the sum of One Million Five Hundred Thousand Dollars ($1,500,000.00) to bypass his properties, which was both possible and practical.

In fact, on August 26, 1953 he increased said offer to Two Million Dollars ($2,000,000.00).

In fact, on October 13, 1953, the landowner offered a right of way to the Ohio Turnpike Commission free of charge provided the route was shifted to pass over one end of his land rather than bisect the same. Engineers in the employ of the Turnpike Commission endorsed this

alternate plan as feasible. The shift required a move of fifty (50) feet at one end of the property and one thousand (1000) feet at the other. This offer was likewise ignored in cavalier fashion, preferring instead to deliberately bisect and ruin the only tracts of land of their kind within the limits of Toledo or Maumee, Ohio. These events in Ellis's struggle to prevent unnecessary destruction of his land and advise the Commission of the values being disturbed thereby are documented in the petition which was before this Court in Cause No. 33868, *Ellis v. Turnpike Commission*, 162 O. S. 86.

The price a man is willing to pay to avoid damage is certainly the best evidence of how severely he will be injured. Can it be said that One Hundred Forty-one Thousand Dollars ($141,000.00) is liberal or even fair compensation for injury the landowner would pay Two Million Dollars ($2,000,000.00) to avoid?

The Court of Appeals understood the facts as they exist and found Ellis had not had a fair trial. If these facts are to be ignored, whether from lack of information, misrepresentation, or any other reason, then the landowner has in fact *not* had the due process of the law to which he is entitled by the Fourteenth Amendment to the Constitution of the United States of America.

For all of the foregoing reasons, and for many others patent on the face of the record, the applicant prays the Court for a rehearing of the within causes.

.....
Counsel

STATEMENT OF SERVICE

Copy of the foregoing application for rehearing was served upon Messrs. Fuller, Harrington, Seney & Henry this 11th day of January, 1956.

Written notice of the filing of the foregoing application for rehearing was served upon the Reporter of the Supreme Court by regular mail this 10th day of January, 1956.

.....

8/26

Office - Supreme Court, U.S.
FILED
JUL 19 1956
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956.

No. 190.

COOLEY ELLIS,

Appellant,

vs.

OHIO TURNPIKE COMMISSION,

Appellee,

and

COOLEY ELLIS,

Appellant,

vs.

HON. JOY SETH HURD, *et al.,*

Appellees.

MOTION TO DISMISS.

LOCKWOOD THOMPSON, *General Counsel,*
Ohio Turnpike Commission,
8080 Prospect Road, Berea, Ohio,
Attorney for Ohio Turnpike Commission, Appellee.

FRANK A. HARRINGTON,
DWIGHT H. MOREHEAD,
WILLIAM L. KREUTZ,
405 Madison Avenue, Toledo, Ohio,
Attorneys for Ohio Turnpike Commission and Hon. Joy Seth Hurd, Julius M. Kovachy and Lee E. Skeel, Appellees.

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APPENDIX I:

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In the Supreme Court of the United States

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COOLEY ELLIS,

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COOLEY ELLIS,

Appellant,

vs.

HON. JOY SETH HURD, *et al.*,

Appellees.

MOTION TO DISMISS.

Now separately come (1) Joy Seth Hurd, Julius M. Kovachy and Lee E. Skeel, Judges of the Eighth District Court of Appeals, State of Ohio, named appellees in the suit entitled Cooley Ellis, Appellant, vs. Hon. Joy Seth Hurd, et al., Appellees, in the caption, who appear specially and only for the purposes of this motion, and (2) Ohio Turnpike Commission, appellee in the suit entitled Cooley Ellis, Appellant vs. Ohio Turnpike Commission, Appellee, in the caption, and pursuant to Rule 16, paragraphs 1(a) and 1(b) of the Revised Rules of the Court, and severally move that the Court dismiss each of the appeals in which they are respectively named appellee, with costs, upon the following grounds:

1. The appeal in the suit entitled "Cooley Ellis vs. Hon. Joy Seth Hurd, et al." is not within the juris-

diction of this Court because not taken in conformity to statute or to the Rules of this Court.

2. The federal questions sought to be raised in each of said appeals were not timely or properly raised or expressly passed on.

3. The judgments in each of said appeals rest on adequate non-federal bases.

4. Neither of said appeals present substantial federal questions.

DECISIONS BELOW.

The appellant's discussion of the decisions which appellant is attempting to appeal herein, as set forth in appellant's jurisdictional statement, is inaccurate and ambiguous.

Appellant is appealing two separate and distinct decisions of the Supreme Court of Ohio entered in separate proceedings in that court involving different parties and separate issues.

The first of the decisions herein appealed, as set forth in the caption, concerned two separate suits originally filed in the Court of Common Pleas, Lucas County, Ohio, by the appellee, Ohio Turnpike Commission, involving the appropriation of separate parcels of land owned by appellant, Cooley Ellis, in connection with the construction of the Ohio Turnpike. *In Re Appropriation by Ohio Turnpike Commission: Ohio Turnpike Commission, appellant, vs. Ellis, appellee*, 164 Ohio State 377, 131 N. E. 2d 397. This decision is reproduced beginning at page 62a of appellant's jurisdictional statement.

The other decision herein appealed concerns a proceeding in procedendo. This suit was filed by the appellant as an original action in the Supreme Court of Ohio against the individual judges of the Eighth District Court

of Appeals, State of Ohio, sitting by designation in the Sixth District in a separate equity proceeding about which appellant complained in the procedendo action. *The State ex rel. Ellis vs. Hurd, et al., Judges,* 164 Ohio State 403, 132 N. E. 2d 100. This decision is reproduced beginning at page 115(a) and the journal entry of the Supreme Court of Ohio sustaining the demurrer to Mr. Ellis' petition is reproduced beginning at page 117(a) of appellant's jurisdictional statement. In the procedendo suit appellant was seeking an order from the Supreme Court of Ohio requiring the Sixth District Court of Appeals of Ohio to strike certain proceedings from the record and to take further action in an entirely separate equity proceeding, not the subject of the appeals now before the Court whereby, as required under the law of Ohio, the appellant had originally sought in the Court of Common Pleas of Lucas County, Ohio, to enjoin the prosecution of the appropriation proceedings above mentioned on various, including constitutional, grounds. The decision of the Supreme Court of Ohio in the equity suit from which no appeal was taken to this Court is reported as *Ellis vs. Ohio Turnpike Commission*, 162 Ohio State 86, 120 N. E. 2d 719, and is reproduced beginning at page 97a of the appellant's jurisdictional statement.

JURISDICTION.

1. The Procedendo Suit.

The appeal in the procedendo action is not within the jurisdiction of this Court because not taken in conformity to the rules of this Court and requires a dismissal of the appeal pursuant to the provisions of Rule 10 of the Court.

The appellees in the procedendo action, the Honorable Joy Seth Hurd, et al., Judges of the Eighth District

Court of Appeals of Ohio, are not named as parties in the Notice of Appeal and were not served with copies of the Notice of Appeal.

The Notice of Appeal indicates in the heading that the appellee is Ohio Turnpike Commission and the proof of service certifies service of the Notice of Appeal only on counsel of record for Ohio Turnpike Commission and does not certify service on the named appellees in the appellant's jurisdictional statement.

Ohio Turnpike Commission, named as appellee in the Notice of Appeal, was not even a party to the procedendo proceeding or to the judgment from which the appeal is taken. The only parties in the procedendo action filed by the appellant as an original action in the Supreme Court of Ohio were the appellant as relator, and the individual judges of the Eighth District Court of Appeals as respondents. No relief against Ohio Turnpike Commission was prayed for and the Commission did not enter an appearance in the procedendo action.

There being a defect of necessary parties and the appeal not being taken in conformity to the Rules of this Court, the appeal in the procedendo action, entitled *Cooley Ellis, appellant, vs. Hon. Joy Seth Hurd, et al., appellees,* should be dismissed. *Wilson vs. Kiesel,* 164 U. S. 248; *Miller vs. McKenzie,* 77 U. S. 582.

The appeal in the procedendo action should be dismissed for the additional reason that the Notice of Appeal indicates no jurisdictional basis for an appeal to this Court. The Notice merely states generally that the decision of the Supreme Court of Ohio in sustaining the demurrer to appellant's petition is in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. Nowhere is there any statement that the validity of a statute of the State of

Ohio was an issue on constitutional grounds or that the decision of the Supreme Court of Ohio sustained the validity of a statute on that basis. Such general and indefinite statements are inadequate and present no questions for the decision of the Court. *Seaboard Airline Railway vs. Watson,* 287 U. S. 86.

In fact, the jurisdictional requirements for an appeal are absent in the procedendo action. As the decision of the Supreme Court of Ohio indicates, the demurrer to the appellant's petition was sustained on procedural grounds on the basis some of the matters to which he referred had already been litigated and finally disposed of while others might perhaps be the subject of further litigation in an action or actions in the Court of Common Pleas in Ohio having jurisdiction. It was held that an action in procedendo in the Supreme Court of Ohio was not appropriate or maintainable to accomplish the objects of the appellant and could not be made the instrumentality of review of other actions. *The State, ex rel. Ellis vs. Hurd, et al., Judges, supra.* The judgment clearly was premised on adequate non-federal bases.

2. The Appropriation Suits.

A. Preliminary Statement.

The appropriation suits were originally filed by the appellee, Ohio Turnpike Commission, on September 4, 1953 and September 10, 1953, to acquire portions of two parcels of unimproved land owned by appellant pursuant to the provisions of the Ohio Turnpike Act, Ohio Revised Code, Sections 5537.01 to 5537.99. Upon trial of these suits in the Court of Common Pleas of Lucas County, Ohio, judgment was entered on the verdicts of juries in the amount of $96,825.00 as to one parcel of land and in the amount of $44,346.50 as to the other.

Pursuant to the provisions of Ohio Revised Code, Section 5537.06, Subdivision O, the Ohio Turnpike Commission deposited the amounts assessed by juries with the Clerk of the trial court for distribution to the land-owner. Pursuant to this statute, title became vested in the State of Ohio and the Commission has taken possession of the land appropriated, constructed a section of the Ohio Turnpike over the land so acquired, which was opened for the use of the general public on October 1, 1955, and has continuously operated the turnpike over the land appropriaated since that date.

Appellant, Cooley Ellis, appealed the appropriation cases to the Court of Appeals for the Sixth District, Ohio, where the judgments of the trial court were reversed by a divided court for alleged errors occurring during the trial of the causes, and remanded to the trial court for further proceedings according to law. *In re Appropriation of Property of Cooley Ellis by Ohio Turnpike Commission,* 70 Ohio Law Abstract 417, 438: Appellant's Jurisdictional Statement, pages 31a to 61a, and 81a to 96a.

The judgments of the Court of Appeals, reversing the judgments of the trial court, were in turn reversed by the Supreme Court of Ohio on appeal by the appellee, Ohio Turnpike Commission, and the judgments of the trial court were affirmed. *In re Appropriation by Ohio Turnpike Commission: Ohio Turnpike Commission, appellant vs. Ellis, appellee, supra.*

These are the appropriation cases appealed to this Court herein.

Under the law of Ohio the only issue in an appropriation suit is the amount of the damage to the landowner. No answer or other pleading is filed by the landowner in the appropriation suit. On appeal in such suits the only questions for review are questions of service of process,

admission and rejection of evidence, the charge of the court upon the proper measure of compensation and similar matters. Constitutional questions, questions as to the necessity of the taking and other questions as to legal impediments as to bringing or maintenance of the suit must be raised in separate injunction proceedings in Ohio. *P. C. C. & St. Louis Ry. Co. vs. City of Greenville,* 69 Ohio State 487, 69 N. E. 976; *Sargeant vs. Cincinnati,* 110 Ohio State 444, 144 N. E. 132; *Cincinnati vs. Vester,* 281 U. S. 439.

Following the settled practice in Ohio, appellant Ellis filed a proceeding in equity in the Court of Common Pleas, Lucas County, Ohio, raising questions of the sufficiency of preliminary negotiations of the Turnpike Commission, engineering design and feasibility of the section of the turnpike passing over his property, constitutionality of the Turnpike Act and other related matters not involved in the valuation of the property in the appropriation proceedings. The demurrer of the Ohio Turnpike Commission to Ellis's petition being sustained in the trial court, he appealed on law and fact to the Court of Appeals, Sixth District, Ohio, where the demurrer was again sustained, the petition dismissed with prejudice and judgment entered for the Commission with costs. On appeal to the Supreme Court of Ohio by appellant the judgment of the Court of Appeals was reversed and final judgment was entered for Mr. Ellis to such an extent as would permit him to erect billboards, signs, etc. on his land not taken for turnpike construction purposes, but was affirmed on all other grounds. *Ellis, appellant vs. Ohio Turnpike Commission, appellee,* 162 Ohio State 86, 120 N. E. 2d 719. Appellant's Jurisdictional Statement, pages 97a to 106a. No appeal from this decision of the Supreme Court of Ohio was taken to this Court by the appellant.

On remand of the equity suit to the Court of Appeals, Sixth District, Ohio, the Ohio Turnpike Commission, pursuant to order of the Court of Appeals, demurred to the remainder of the petition in the equity suit which demurrer was sustained by Judges Hurd, Kovachy and Skeel of the Eighth District, Ohio, sitting by designation in the Sixth District. *Ellis vs. Ohio Turnpike Commission,* 100 Ohio App. 10; 122 N. E. 2d 713. Appellant, Ellis, again appealed the equity suit to the Supreme Court of Ohio which overruled his motion to certify and dismissed his appeal as of right on the basis that no debatable constitutional question was involved. *Ellis vs. Ohio Turnpike Commission,* 163 Ohio State 157, 125 N. E. 2d 880. Again no appeal was taken by the appellant from this decision of the Ohio Supreme Court to this Court.

Appellant Ellis, having litigated constitutional questions in the equity suit twice in the Supreme Court of Ohio and having failed to appeal those decisions to this Court, is now attempting to have this Court pass upon those questions in the appropriation suits here appealed.

B. Absence of Jurisdictional Requirements for Appeals.

The constitutional issues which appellant seeks to raise in the appropriation suits were raised for the first time either in this Court in his jurisdictional statement or in the Supreme Court of Ohio on his applications for rehearing. These applications were overruled on January 25, 1956 by that Court without the constitutional issues being expressly passed upon and without opinion.

Appellant states that the issues in this appeal come under two subdivisions: (1) "whether the Appellant was given due process of law and adequate compensation for his property and the damage inflicted upon him" and (2) "the question as to the constitutionality of the Ohio Turnpike Act." Appellant's Jurisdictional Statement, page 12.

The question of "due process of law and the adequate compensation for his property" was not contained in Appellant's Notice of Appeal and is raised in the Jurisdictional Statement for the first time. This question, not being set forth in the Notice of Appeal and involving no question as to the constitutionality of a state statute, presents no question for the consideration of this Court on appeal.

Likewise, numbered questions (6), (7) and (8) on page 9 of Appellant's Jurisdictional Statement were not included in the Notice of Appeal, involve no questions as to the constitutionality of a state statute, and present no questions for the consideration of this Court on appeal.

Numbered question (9) was not included in the Notice of Appeal and presents no question for consideration by this Court on appeal.

The remaining question as to the constitutionality of the Ohio Turnpike Act has been attempted to be raised by some of the questions set forth in Appellant's Notice of Appeal and in some of the remaining numbered questions at pages 7 and 8 of Appellant's Jurisdictional Statement.

Question (2) seeks to draw in issue the constitutionality of the right of the Commission to appropriate abutters' or access rights, and question (3) the right of the Commission to appropriate property for purposes of restaurant and similar service establishments incidental to the use of the turnpike. The exercise of such rights which are clearly granted by the Turnpike Act involves matters of the construction of a state statute or of the improper exercise of power under the statute, and not of the validity of the statute itself on constitutional grounds, and provide no basis for an appeal to this Court. *Jones, et al. Trustees, vs. Prairie Oil and Gas Co.*, 273 U. S. 195; *Zucht vs. King*, 260 U. S. 174.

The remaining questions presented by the appeals, numbered (1), (4) and (5), which attack the delegation

to the Ohio Turnpike Commission of the right to appropriate property for turnpike purposes and take title to the property in the name of the State of Ohio, and raise the question of the requirement of a hearing on the necessity of the appropriation, even if properly or timely raised, are so patently insubstantial as to require dismissal of the appeals. The Act has heretofore been sustained as constitutional when attacked on grounds of delegation of legislative powers. *State, ex rel. Allen vs. Ferguson*, 155 Ohio State 26, 97 N. E. 2d 660. The requirement of a hearing on the question of necessity was litigated by the appellant in the separate equity action discussed above from which no appeal was taken to this Court.

However, none of the questions sought to be raised were timely and properly raised or expressly passed upon by the Supreme Court of Ohio in the appropriation suits here appealed.

The errors assigned by appellant in his cross appeals to the Supreme Court of Ohio in the appropriation suits include no mention of constitutional issues, being limited entirely to alleged errors occurring in the course of the trial in the trial court. The errors assigned by appellant in the Supreme Court of Ohio are listed in Appendix I, at page 13.

Federal constitutional issues, the subject of the appeals to this Court, were attempted to be raised by appellant for the first time in the appropriation suits on applications for rehearing before the Supreme Court of Ohio. Appellant's Jurisdictional Statement, pages 4 and 5. As already noted, the Supreme Court of Ohio, in overruling the applications for rehearing without opinion, did not expressly pass upon the issues attempted to be raised for the first time on motion for rehearing in the Supreme Court of Ohio.

The excuse advanced by appellant for not raising constitutional questions at an earlier stage in the proceedings —that the Supreme Court of Ohio unexpectedly permitted an appeal in the case from the judgment of the Court of Appeals, Sixth District, Ohio, Appellant's Jurisdictional Statement, page 4—is spurious and a *non sequitur*. The right of appeal in such cases to the Supreme Court of Ohio is unquestioned. Constitution of Ohio, Article IV, Section 2; *Tod vs. Wick Brothers & Co.*, 36 Ohio State 370 (1881); *Place vs. Elliott*, 147 Ohio State 499; 72 N. E. 2d 103 (1947); *Marion Machine Foundry and Supply Company vs. Cincinnati Coffin Company*, 162 Ohio State 455, 124 N. E. 2d 132 (1955).

This Court has repeatedly held that federal questions are not timely or properly raised if raised for the first time on application for rehearing before the highest appellate court in the particular state. *Mergenthaler Linotype Co. vs. Davis*, 251 U. S. 256; *Live Oak Water Users' Association vs. Railroad Commission*, 269 U. S. 354. Likewise it is well settled under Ohio practice that constitutional questions cannot be raised for the first time in the Supreme Court of Ohio. *The Village of Clarington vs. Alther*, 122 Ohio State 608, 174 N. E. 251. *Chicago B. & Q. Rd. vs. Chicago*, 166 U. S. 226, relied on by the appellant as authority for permitting raising such questions on rehearing, is not in point for the reason that the constitutional questions in that case were raised in the trial court on motion for new trial under apparently proper practice in Illinois and were assigned as the bases for error in the Supreme Court of Illinois. Such is not the instant case.

Constitutional objections to appropriation proceedings are properly raised under the law of Ohio only if raised in separate equity proceedings. *P. C. C. & St. Louis*

Ry. Co. vs. City of Greenville, supra; Sergeant vs. Cincinnati, supra; Cincinnati vs. Vester, supra.

This rule was not only recognized by appellant but invoked by him in the separate equity proceeding he instituted in the Court of Common Pleas of Lucas County, Ohio, to enjoin prosecution of the appropriation suits on various, including constitutional, grounds. The issues in his equity suit as already noted were thoroughly litigated twice in the Court of Appeals, Sixth District, Ohio, and twice in the Supreme Court of Ohio. As to certain of appellant's claims concerning the right of the appellee to appropriate rights to erect and maintain billboards and signs on appellant's remaining property, appellant was successful. As to his other claims appellant was unsuccessful. *Ellis vs. Ohio Turnpike Commission,* 162 Ohio State 86, 120 N. E. 2d 719; 100 Ohio App. 10, 122 N. E. 2d 713; 163 Ohio State 157, 125 N. E. 2d 880. Appellant took no appeal from these decisions to this Court.

The motion to dismiss the appeals in both the procedendo suits and in the appropriation suits should be granted.

Respectfully submitted,

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APPENDIX I.

Appellees' Cross-Assignments of Error in Supreme Court of Ohio From Cause No. 4777 in Court of Appeals, Lucas County, Ohio.

"ASSIGNMENT OF ERROR

Appellee-Cross-Appellant Cooley Ellis assigns as error the action of the Court of Appeals of Lucas County, Ohio on March 14, 1955:

(1) In overruling assignment of error in admission of evidence as to the cost of the property in 1947. (C. A. Assignment #3);

(2) In overruling assignment of error in failure to limit the evidence of the cost of the property. (C. A. Assignment #4);

(3) In overruling assignment of error in court instructions as to billboard and sign rights, and in failing to charge in relation to abutter's rights appropriated.

(4) In overruling assignment of error in that the verdict was manifestly against the weight of the evidence.

WINTER & FRANK,

Attorneys for Appellee-Cross-Appellant."

Appellees' Cross-Assignments of Error in Supreme Court of Ohio From Cause No. 4778 in Court of Appeals, Lucas County, Ohio.

"ASSIGNMENT OF ERROR

Appellee-Cross-Appellant assigns as error the action of the Court of Appeals of Lucas County, Ohio on March 14, 1955:

1. In overruling assignment of error concerning admission of evidence of what Ellis had paid for the subject property. (C. A. Assignment No. 3).

2. In overruling assignment of error as to witness Ruppert.

3. In overruling assignment of error in excluding evidence of potential sales as a shopping center which represented the best use of the property.

4. In overruling assignment of error based on exclusion from evidence of a lease of a part of the property (Exhibits 32 and 32-a), and in refusing to permit the cross-examination of the Commission's experts in relation thereto, or in relation to rentals, generally.

5. In overruling assignment of error charging abuse of the discretion in limiting time for argument.

6. In overruling assignment of error concerning the delivery to the jury before argument of Request No. 2 of the Commission.

7. In overruling assignment of error by the court in its charge to the jury in failing to charge on the abutter's rights appropriated.

8. In overruling an assignment of error that the verdict and judgment are each contrary to the manifest weight of the evidence.

WINTER & FRANK,

Attorneys for Appellee-Cross-Appellant."

15/27

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 190

COOLEY ELLIS,
Appellant,
vs.
OHIO TURNPIKE COMMISSION,
Appellee

and

COOLEY ELLIS,
Appellant,
vs.
HON. JOY SETH HURD, ET AL.,
Appellees

BRIEF OPPOSING MOTION TO DISMISS

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BRIEF OPPOSING MOTION TO DISMISS

PRELIMINARY STATEMENT

For a full understanding of the issues presented it is important to understand the eminent domain procedure under Ohio law. Eminent domain is a throwback to the days of kings where nothing more is required for the seizure of private property than the desire of the king to take it. In this country the power and right to seize is only curbed by our constitutional guarantees, both state and federal. Consequently in every proceeding whereby private property is seized by governmental authority, the constitutional questions are inherent in the very nature of the proceeding and must be presumed to have received the attention of the court at all stages of the proceedings.

The state of Ohio is included in the majority group of states wherein the exercise of the power of eminent domain is an administrative and not a judicial function of the government.

Appellees concede, and rightly so, that under Ohio procedure, appropriation proceedings are strictly statutory; that they bear no resemblance to a judicial proceeding; require no pleadings and have no other issue aside from fixing the amount of just compensation for the property seized. The property owner is not permitted to put in any motion, answer or other pleading and is limited strictly to the testimony of himself and his witnesses on the sole issues of value and damage.

Nor is there any provision or prescribed procedure requiring the property owner to institute a suit in equity. At his option he may resort to equity on the theory that he has no other remedy and seek to enjoin the appropriation proceeding on the ground that no necessity exists for the

taking or for other reasons but there is nothing in Ohio law that requires him so to do.

The Ohio appropriation procedure calls for nothing more than the resolution for the taking, petition for impanelling of a jury to assess values and damages and entry of judgment confirming the award. No provision is made for new trial and appeal is limited to the Court of Appeals where a review may be had of the proceedings below and the award either confirmed or remanded for a further assessment.

We think we should likewise call the Court's attention to the sequence of events in this litigation for a better understanding of the situation.

Shortly after institution of the appropriation proceedings appellant herein sought to enjoin the proceedings by a suit in equity wherein he urged that there was no necessity for the taking; that the Turnpike Act was unconstitutional and that his property was being seized without due process of law. A demurrer to his petition was sustained and ultimately reached the Supreme Court of Ohio, terminating in the decision of that court as appears in Appendix D of the Jurisdictional statement.

Since no injunctive relief could be obtained the appropriation cases were heard and pending on appeal in the Court of Appeals when the Supreme Court of Ohio rendered its decision in the equity case. Appellees in the meantime had seized appellant's property and excavated the same to a large extent. In the appropriation proceedings appellant's property, including sign rights, abutter's rights and the right of way had been assessed and appropriated. The decision of the Ohio Supreme Court which combined appellant's case with another man's case without privity

of interest, apparently was in favor of appellant with regard to sign rights, was confusing as to what was intended relative to sustaining the demurrer and gave the appellant no relief whatever other than a mere expression of opinion as to the validity of the taking of sign rights.

Several months after the said decision in the equity case the Court of Appeals reversed the awards in the appropriation cases. Appellant was held to have not obtained fair compensation and appellees then appealed to the Supreme Court of Ohio and ultimately prevailed. The procedendo proceeding was then started for the purpose of clarifying the decision in the equity case and applications for rehearing were made in the appropriation proceedings. The Supreme Court of Ohio ruled against appellant in all matters, being well aware of appellant's contention that he was being deprived of his property without just compensation and without due process of law.

THE PROCEDENDO PROCEEDING

This is a combined appeal which was designed to bring all suits before this Court for the purpose of showing that the Supreme Court of Ohio was at all times aware of appellant's constitutional claims and decided the same adversely to him. Technically the title to the procedendo case is against the Judges of the Court of Appeals but in reality the Turnpike Commission is the real party in interest and the proceeding was defended by them and by the same attorneys as the other cases.

As heretofore pointed out this proceeding was for the purpose of clarifying the decision of the Supreme Court of Ohio in the equity case wherein the appropriation of sign rights at least was decided in appellant's favor, but

which came to naught by reason of their prior appropriation which remains unmodified. We concede that the procedendo proceedings in themselves would not warrant an appeal to this Court; that no practical relief can be obtained therefrom and that the entire equity case is largely moot inasmuch as the injunctive relief therein sought cannot now be obtained, the Turnpike now having been fully completed. The only value of the procedendo proceeding would be in connection with the appropriation cases to show that the Supreme Court of Ohio passed on the questions involved and to acquaint this Court with the controversy in its entirety.

THE APPROPRIATION CASES

Appellee in its motion to dismiss expends considerable effort in presenting the case on the merits or rather the final hearing of this cause. It is pointed out that appellant was awarded a total in excess of a hundred and forty thousand dollars. We might well state that said sum is not one tenth of the damage sustained, but we are not prepared nor are we required at this stage of the case to present a brief which will be comprehensive on the questions raised. Neither are we required at this stage to brief the case as to whether the claim of appeal is sufficient to justify all of the questions which we have raised. It is enough if only a few are properly before this court and to sustain the appeal it is only necessary to show that there is probable jurisdiction.

The main contention with respect to the probable jurisdiction of this court is whether appellant's contentions were timely raised in the Ohio courts. We are well aware of the numerous decisions of this court that as a general

rule, a question raised for the first time on rehearing in a state court comes too late. There are some exceptions, to-wit: where no opportunity was given to sooner present them and where the final decision of a state supreme court is a matter of surprise.

As we have pointed out, appropriation cases in Ohio are strictly a matter of statute. Without pleadings of any kind no defense other than values can be contested; there is no provision for a new trial in the trial court and appeal is expressly limited to the Court of Appeals. In cases of this character however, it is inherent in the very nature of the proceedings that a property owner's property rights are to be protected by the constitutional guarantees. Therefore no opportunity presented itself to appellant to raise these questions except on motion for rehearing before the Supreme Court of Ohio before appealing to this court.

Appellee makes light of our contention that we were caught by surprise by the decision of the Supreme Court of Ohio. We do not claim surprise with reference to its decisions upholding the constitutionality of the Turnpike Act. True that was to be expected We do claim surprise when that court for the first time in its history took jurisdiction on appeal of a purely statutory and administrative proceeding to annul the order of the Court of Appeals for a mere reassessment of damages; and where in a long line of decisions and interpreting the constitution of the State of Ohio, they had consistently held that a judgment or decree for the purposes of appellate jurisdiction meant a *final* judgment.

When the Supreme Court of Ohio took unwarranted jurisdiction of a statutory appropriation proceeding and annuled the order of the Court of Appeals granting him a reassessment of his damages, which was provided for

under the laws and constitution of that State, appellant was denied due process of law and his property was taken without just and fair compensation. Obviously he had no opportunity to raise this question until after the Supreme Court had made its decision depriving him of his rights and certainly the raising of the same on rehearing cannot be said to be too late.

Aside from the deprivation of his vested right to a reassessment; appellant was deprived of due process for the reason that the description of the property was so vague and uncertain in legal description as to not form a proper basis for the appropriation proceeding; likewise and for like reason the sign rights and abutter's rights were so taken; and the award made was not made solely to appellant although he was the undisputed owner of the property, but made to a large number of people without defining or determining their interest and with the result that appellant could obtain nothing except by long and expensive litigation against unknown defendants. This latter type of denial of due process originated in the lower court but under the law of the state this appellant was denied any opportunity to raise the same in an appropriation proceeding.

We here want to point out that the equity suit was not obligatory to the appellant and that he never had his day in court for the reason that he was blocked by a demurrer which in disregard of all recognized practice was split up by the Supreme Court of Ohio. Appellant never had an opportunity to present his case and certainly can be in no worse position than if he had never started it. There just was no binding adjudication in the case.

All the citations of authority by appellee deal with judicial determinations of the courts and with cases where

issues are framed and tried out between the parties. They simply have no application to a case of this character.

Appellee contends that the case of *Chicago B. & Q. Rd. v. Chicago,* 166 U. S. 226 is not in point for the reason that in that case the constitutional questions were raised in the trial court on motion for new trial "*under apparently proper practice in Illinois.*" We emphasize their own statement for the reason that in Ohio no provision is made for new trial in the trial court. Therefore at no stage of the proceeding did this appellant have an opportunity to raise the constitutional questions in the appropriation proceedings prior to his application for a rehearing in the Supreme Court of Ohio.

On page 231 of the above cited case (41 L. Ed. 983) Justice Harlan said:

> "It is not, therefore, important that the defendant neither filed nor offered to file an answer specifically setting up or claiming a right under the constitution of the United States. It is sufficient if it appears from the record *that such right was specially set up or claimed in the state court in such manner as to bring it to the attention of that court.*"

Appellee lays great stress on the fact that the Supreme Court of Ohio has heretofore upheld the constitutionality of the Turnpike Act. That is true as to only certain phases of the act that came into question and whether the act would be sustained in this Court in an eminent domain proceeding certainly presents a meritorious question for consideration.

However we refuse to be side tracked from our main contention which is that even conceding the constitutionality of the act, that we have been deprived of our property

without just compensation and without due process of law for the reasons above stated. Further appellee's statement that we seek an interpretation of the Turnpike Act relative to abutter's rights etc. is untrue and misleading. Our claims relative to description of property, sign rights and abutter's rights is that the description of the same in the appropriation proceeding is so vague and uncertain that it cannot be ascertained just what was taken and the jury were in no position to make an award on the basis thereof.

We believe that we have met the jurisdictional requirements of this court without doubt on our contention that the final decision of the Supreme Court of Ohio which deprived us of a reassessment of damages violated our constitutional rights and calling attention to it on application for rehearing was sufficient.

Secondly we believe we are on solid ground when we say that by reason of misdescription, indefiniteness and uncertainty the appropriation proceedings are fatally defective from a constitutional standpoint and that a general award to a number of persons without any specific award to appellant, has the same effect as no award whatever and that he has received no compensation.

Thirdly we believe that the Ohio Turnpike Act is void as an unlawful delegation of the powers of the legislature and of the power of eminent domain and that in a proceeding of this character that even if not raised except on rehearing that it is timely and that in any event if this court takes jurisdiction of this cause on other grounds, that it may, in its discretion, render an opinion on matters that

otherwise might not have been properly placed before the Court.

We respectfully request that the motion to dismiss the appeals be denied.

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18/28

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IN THE

Supreme Court of the United States

October Term, 1956

No. 190

COOLEY ELLIS, *Appellant*,

v.

OHIO TURNPIKE COMMISSION, *Appellee*,

and

STATE OF OHIO, EX REL. COOLEY ELLIS, *Appellant*,

v.

HON. JOY SETH HURD, ET AL., *Appellees*.

On Appeal from the Supreme Court of
the State of Ohio

PETITION FOR REHEARING OF ORDER DENYING APPEAL OR CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1956

No. 190—Appeal Docketed June 22nd

COOLEY ELLIS, *Appellant*,

v.

OHIO TURNPIKE COMMISSION, *Appellee*,

and

STATE OF OHIO, EX REL. COOLEY ELLIS, *Appellant*,

v.

HON. JOY SETH HURD, ET AL., *Appellees*.

On Appeal from the Supreme Court of the State of Ohio

PETITION FOR REHEARING OF ORDER DENYING APPEAL OR CERTIORARI

To The Supreme Court of the United States and The Justices Thereof:

Petitioner Cooley Ellis, appellant herein, respectfully prays that this Honorable Court grant a rehearing of its determination in the above entitled matter dated October 8, 1956, under which appeal or certiorari was denied for "lack of a substantial federal question".[1] Petitioner states his reasons therefor as follows:

---

[1] By order dated October 31, 1956, Justice Reed extended the time for filing a Petition for Rehearing herein to and including November 19, 1956.

I

It is the purpose of this petition to bring to the Court's attention reasons not assigned in the original appeal herein, indicating, we believe conclusively, that petitioner has been deprived of substantial federal rights guaranteed to him under the United States Constitution, and to clarify the basis for several grounds of appeal that were previously presented but which, in the confusion of the record, might not have been made sufficiently explicit. The ultimate aim of this petition is to prevail upon this Court to accept the present appeal for the purpose not so much of adjudicating various rights not adjudicated in the courts below as set forth in the original appeal herein, but, after examination of the record and of petitioner's present contentions, to remand the case to the Ohio courts for the adjudications which those courts have failed to make and which has had the effect of depriving petitioner of the due process of law guaranteed him under the Fourteenth Amendment to the United States Constitution.

II

1. It will be recalled that the present case involves essentially the validity of certain action taken by the State of Ohio through its Ohio Turnpike Commission in seizing, through the power of eminent domain under appropriation or condemnation proceedings, portions of real property of petitioner located on the outskirts of Toledo, Ohio, for the purpose of constructing the Ohio Turnpike through the center of that property. Although proceedings of this nature involve the taking of property against an owner's wish, and hence are universally regarded as one of the harshest known to Anglo-American law and where the requirements of due process are more than anywhere else to be strictly observed

(*Dohany* v. *Rogers*, 281 U.S. 362), petitioner has been entirely denied any procedural due process by virtue of the refusal of the Ohio courts to adjudicate various fundamental issues which have been raised by petitioner in the hearings below. By one procedural device or another, the Ohio Turnpike Commission has succeeded in denying petitioner justice in this case and in depriving him of extremely valuable property rights. The end result of the proceedings in the Ohio courts is that petitioner has not received adequate or, in respect to certain aspects of the State's acquisition of his land, any compensation for the rights that have been taken from him, and the extent of the title, right and interest which petitioner has been permitted to retain in that portion of his lands not seized by the State has been left in utter confusion and doubt.

2. More specifically, petitioner has not received an adjudication respecting various issues of state and federal law involving the validity of the seizure of his properties raised in petitioner's equity suit (See Jurisdictional Statement herein, p. 97a) which culminated in the procedendo proceeding in the Ohio Supreme Court (*State ex rel Ellis v. Murd, et al*, Jurisdictional Statement, p. 115a) which is a subject of the present appeal, and has not received an adjudication of various other of his rights as litigated in the condemnation or appropriation proceedings below (*Ohio Turnpike Commission v. Ellis*, Jurisdictional Statement, p. 62a) which also are the subject of appeal to this Court. It matters not whether such rights or issues have basis under state or federal law or even what is their precise nature. The point is that petitioner has had no adjudication at all respecting these issues, as a result of which he has had his property taken from him without full hearing, and this, in itself, amounts

to a denial of the due process of law to which defendants in any judicial proceeding, and particularly in a condemnation proceeding, are entitled under the Fourteenth Amendment. The due process clause protects the landowner from the adoption of any form of procedure in eminent domain cases which deprive him of a reasonable opportunity to be heard and so to present such objections and claims as he is entitled to make. (18 Amer. Juris. 633.) See also *Chicago, Burlington & Quincy R. Co. v. Chicago,* 166 U.S. 226; *Dohany v. Rogers, supra; Turpin v. Lemon,* 187 U.S. 51; *Huling v. Kaw Valley Improvement Co.,* 130 U.S. 599.

III

1. In respect to the lack of due process in the equity and procedendo proceedings, petitioner respectfully refers this Court to the following: Although petitioner's equity suit raised important issues under both state and federal law, the trial court disposed of them by allowing a general demurrer in spite of the fact that a number of the issues involved mixed questions of fact and law, and the intermediate appellate court in Ohio (Court of Appeals) to which the case was then appealed likewise refused to adjudicate such issues but merely sustained the demurrer without opinion. On appeal to the Supreme Court of Ohio, that court, without petitioner's consent, consolidated his appeal with that of another litigant (Solether) who in an entirely separate case also was contesting appropriation proceedings attempted by the Ohio Turnpike Commission, but who had raised only one of the many issues raised by petitioner. In its opinion in such consolidated appeal, the Supreme Court of Ohio made an adjudication respecting only that issue

(resolved in petitioner's favor), leaving unadjudicated (except by way of incidental reference to only several of the many other issues raised by petitioner) the balance of petitioner's contentions which indeed were his principal contentions. However, that court, in its formal judgment in the case, ordered the decision of the intermediate court (Court of Appeals) reversed in its entirety and seemingly remanded the case to the Court of Appeals for its determination of the balance of the issues raised by petitioner. While the judgment of the Ohio Supreme Court is somewhat ambiguous on the question of remand, that ambiguity was clarified by a letter dated July 7, 1954, addressed by the Ohio Supreme Court justice who wrote the decision in the case (Justice Charles B. Zimmerman) to the Clerk of the Supreme Court in respect to the framing of the judgment entry. This letter reads in part as follows:

> "It is my distinct impression that it was the intent of the Supreme Court to decide in the Ellis case only the question that was decided and raised in the Solether case, viz., that Ellis had the right to erect billboards, signs, notices, posters or other advertising devices on his lands not taken for turnpike construction purposes, and that it was not the intent or purpose of the court to render final judgment for Ellis with respect to other matters asserted in his petition. As I remember it, the lower courts, or at least the Court of Appeals, have not decided these other questions and they should certainly be the subject of a judgment by the Court of Appeals before the Supreme Court may dispose of them.
>
> "In my judgment, the proposed judgment entry you have prepared is about right and I think such entry should be confined to the limited proposition therein stated."

2. Based on the foregoing, petitioner assumed, and rightly so, that the case had been remanded to the Court of Appeals for determination of the unresolved issues in the case, and for that reason petitioner did not attempt to appeal the decision in the equity case to this Court. However, when the case was heard before the Court of Appeals pursuant to such remand, that court determined that the Ohio Supreme Court had decided all issues raised by petitioner and sustained a second demurrer filed by the Ohio Turnpike Commission without even allowing petitioner to amend his original complaint to raise certain other issues which either had not been raised before or which had come into existence by virtue of the conclusion of the condemnation proceedings which had been litigated concurrently. When petitioner appealed this determination of the Ohio Court of Appeals to the Ohio Supreme Court, that court dismissed the appeal without opinion. Petitioner accordingly commenced the procedendo action in the Ohio Supreme Court in an effort to have the court's original judgment in the equity case enforced by requiring an adjudication of the merits of petitioner's contentions by the Court of Appeals. In an opinion rendered on the same day that its opinion in the condemnation proceedings was issued, the Supreme Court of Ohio dismissed the procedendo proceedings on the ground that the petitioner's issues had been previously adjudicated. This decision as well as the decision in the condemnation proceedings are the subject of the present proceedings in this Court. As is obvious from the foregoing recital of the procedures in petitioner's equity suit, petitioner simply has not had the benefit of an adjudication on various serious issues raised in the equity case and thus has been deprived of the full hearing to which he is entitled under the due process clause of the Fourteenth Amendment.

IV

1. In the condemnation proceedings petitioner was accorded the same denial of due process by a similar refusal to adjudicate important issues raised here. While petitioner continues to insist, as previously pointed out in its appeal to this Court herein, that the determinations of the Supreme Court of Ohio in the condemnation cases were in error for the reasons there stated, and that such error involves issues of sufficient federal substance to warrant this Court's acceptance of that appeal,[2] it should in addition be pointed out that the failure of that court or of any other Ohio court to pass on other important issues raised below is equally erroneous and requires, if not an adjudication of such issues by this Court, at least a remand of the present proceedings to

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[2] The merit and substance of the issue respecting the adequacy of the compensation for the taking of his property awarded petitioner in the condemnation proceedings ($140,000 as both compensation for his property taken and for damages suffered by reason of such taking, an amount less than that to which several of the Commission's own experts on valuation testified) is graphically illustrated by the following fact: Prior to the condemnation proceedings petitioner offered, and the Ohio Turnpike Commission refused (1) the sum of $2,000,000 if the Commission would, as was feasible, bypass petitioner's property, which is a sum more than sufficient to compensate the Commission for any change in its plans that might be occasioned thereby, and (2) a free grant of land to the Commission if, as the Commission's own engineers admitted was feasible, the Commission would run its turnpike through one end rather than through the center of petitioner's property where a large shopping center and housing development was about to be constructed. Another flagrant instance of disregard of petitioner's rights in the condemnation proceedings below is seen in the exclusion of all testimony of petitioner's experts relating to the petitioner's completed plans (including lease commitments, approval of federal loans, etc.) for the immediate erection and operation of a shopping center and housing development on petitioner's property—plans started long before the turnpike project but now nullified. This Court has held that adequate compensation must include an evaluation of the best use to which the property could be put. "The general rule is that compensation 'is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future.'" **Chicago, Burlington & Quincy R. Co. v. Chicago,** 166 U.S. 226, at 250; **McGovern v. New York,** 229 U.S. 363, at 372.

the Ohio courts for adjudication of such issues there if petitioner is to be accorded full procedural due process.

2. Specifically, petitioner raised in the condemnation proceedings in the courts below, but was unable to obtain an adjudication concerning them, the following very important issues substantially affecting his rights and a denial of an adjudication or a rejection of which would operate to deprive petitioner of property without compensation and without due process:

(a) The final verdict in the proceedings granting the Ohio Turnpike Commission a strip through the center of petitioner's property appropriated to that Commission "any and all abutters' rights".[3] There is no attempt to define the term "abutters' rights" in either the resolution of the Turnpike Commission under which it sought to acquire the ""rights" in question or in the Act creating the Commission, nor was there any attempt made by either the Commission or the trial court in the course of the appropriation proceedings to explain just what such "rights" consisted of. The term is not one of art, and finds no definition in any of the standard legal dictionaries or in "Words and Phrases" or in real property texts. Whether the "rights" thus acquired are affirmative rights in the new owner to do certain things on his land, or, as is more likely, are negative rights accorded that owner under which petitioner, as the adjoining land owner, is denied privileges or rights in respect to the use or enjoyment of his property, is unknown. Petitioner apparently has no access rights to his remaining acreage and no way of putting in

[3] This verdict granted the Commission the following rights on petitioner's remaining lands:

"First: Any and all abutters' rights, including access rights, appurtenant to any remaining portion of the lands of said owner or owners of which the above-described real estate shall have formed a part prior hereto, in, over, or to the parcel described above as Parcel No. 51-G, including such rights to any turnpike constructed thereon." (See Jurisdictional Statement 30(a) and 80(a).)

either roadways or utilities. As a practical matter, petitioner has been refused title insurance on his remaining land by virtue of such appropriation of "abutters' rights", and, to a degree impossible to estimate, the value of all of petitioner's adjoining property has been diminished if not destroyed. For this he has been paid no compensation, nor has he even been accorded a determination of what the State has taken or of what he has been deprived, although the issue has been rpeatedly raised below. In addition to the property loss and damage thus sustained by petitioner, it would appear that the taking of "any and all abutters' rights" represents a taking of property so vague and indefinite in description as to constitute a violation of the due process of law guaranteed property owners in eminent domain proceedings under the Fourteenth Amendment to the United States Constitution.

(b) The decision of the Supreme Court of Ohio in the equity case *(Ellis v. Ohio Turnpike Commission)* held that the Turnpike Commission had no authority to deny petitioner the right to erect and maintain billboards or other advertising signs on his remaining property adjacent to the turnpike. The verdict appropriating petitioner's property for the Turnpike Commission contains language which on its face gives the right to erect such signs on petitioner's adjoining lands to that Commission.[4] Thus, there is not only an apparently dual right in petitioner and the Commission to erect signs on petitioner's adjoining property, but the value of petitioner's adjoining property has to that extent been impaired. Yet this factor was in no way taken into consideration in either evaluating damages to petitioner or

[4] This verdict reads as follows:
"**Second:** All rights to erect on any of the aforesaid remaining lands any billboard, sign, notice, poster, or other advertising device which would be visible from the travelway of Ohio Turnpike Project No. 1, and which is not now upon said lands." (See Jurisdictional Statement 30(a) and 80(a).)

in determining the value of the rights taken by the State, and the courts below have refused to resolve the obvious ambiguity.

(c) The verdict for compensation and damages in the appropriation proceedings against petitioner ran not only to petitioner but also to some twelve other individuals who were brought into the proceedings by the Commission but who have no title or interest whatsoever in the property appropriated. See Jurisdictional Statement 30(a) and 80(a). No attempt was made by the Commission or the courts to resolve the issue of ownership, with the result that although at the hearing the petitioner demonstrated he was the sole owner and was the only person to make an appearance in the appropriation proceedings, he now finds himself one of a dozen to whom compensation and damages are ordered to be paid. Again, this question was raised below to no avail.

V

The foregoing represents but some of many examples of the manner in which petitioner has been deprived of a hearing and determination respecting his rights. Other examples are set forth in the original appeal herein before this Court. It is respectfully suggested that in proceedings where, as here, the State has taken action to deprive an individual of his property under the stringent proceedings of condemnation, this Court should, as it has in the past, be particularly vigilant in according property owners adversely affected their full measure of due process. The present scope of highway development and the plans for future highway developments indicate that many an additional land owner will be put in petitioner's position, and it would indeed be most unfortunate if the treatment accorded petitioner in the present case by the Ohio Turnpike Commission stands as

precedent for similar treatment of hundreds and perhaps thousands of other owners of property whose lands are involuntarily seized.

WHEREFORE, it is respectfully requested that the appeal herein be granted for the purpose of determining from the record herein the degree to which petitioner has been deprived of federally-protected rights and to determine whether petitioner should either by way of remand to the state courts or by decision of this Court be accorded the full due process of law appropriate to exercise of the powers of eminent domain.

Respectfully submitted,

HERBERT S. THATCHER,
431 Tower Building,
Washington, 5, D. C.
Counsel for Petitioner.

CERTIFICATE OF COUNSEL

This is to certify that the Petition for Rehearing filed herein is presented in good faith and not for delay under the sincere belief that it sets forth grounds not previously presented which require reexamination of this case by this Court. Petitioner does not attempt to reargue matters argued in petitioner's original appeal. As to delay, any delay operates to the prejudice of petitioner and not to the respondents who have already been granted and are presently enjoying all of the rights and benefits which they have sought or claimed in the proceedings below.

HERBERT S. THATCHER,
Counsel for Petitioner.

PROOF OF SERVICE

I, Herbert S. Thatcher, counsel for Cooley Ellis, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of November, 1956, I served copies of the foregoing Petition for Rehearing of Order Denying Appeal or Certiorari to the Supreme Court of the United States by first-class mail on the several parties thereto, as follows: Lockwood Thompson, Esq., 8080 Prospect Road, Berea, Ohio; Frank A. Harrington, Esq., Dwight H. Morehead, Esq., and William L. Kreutz, Esq., 405 Madison Avenue, Toledo, Ohio, Attorneys for Ohio Turnpike Commission.

HERBERT S. THATCHER,
Counsel for Petitioner.

No. 190. ELLIS *v.* OHIO TURNPIKE COMMISSION ET AL. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied. *John F. Hunter* and *Edward N. Barnard* for appellant. *Frank A. Harrington* for the Ohio Turnpike Commission et al., appellees. Reported below: 164 Ohio St. 377, 403, 131 N. E. 2d 397, 132 N. E. 2d 100.